APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 96-6704; 97-5140

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; AND OAK DISTRIBUTING CO.,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Nos. 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896, 7-CA-32986, 7-CA-33649, 7-CA-33707, 7-CA-31302

Argued: March 19, 1998

Decided and Filed: June 2, 1998

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Rosemary M. Collyer, CROWELL & MORING, Washington, D.C., for Petitioners. Sharon I. Block, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Samuel C. McKnight, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Intervenor. **ON BRIEF:** Rosemary M. Collyer, CROWELL & MORING, Washington, D.C., Patrick W. Jordan, JEFFER, MANGELS, BUTLER & MARMARO, San Francisco, California, for Petitioners. Sharon I. Block, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C. Aileen A. Armstrong, Linda Dreeben, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Samuel C. McKnight, Lisa M. Smith, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Intervenor.

OPINION

BOGGS, Circuit Judge. This case comes to us on the petition of six Detroit-area beer distributors (collectively, "Distributors") to review an order of the National Labor Relations Board ("NLRB") finding that the Distributors committed unfair labor practices in violation of Sections

8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), and on the NLRB's cross-petition for enforcement of its order. We are confronted with two issues; first, whether the Distributors' conduct during collective bargaining sessions with the union representing their employees constituted unlawful "joint" or "multiemployer" bargaining, or merely constituted permissible "coordinated" bargaining; and second, whether the NLRB was time-barred from pursuing a claim against the Distributors based on unlawful multiemployer bargaining.

I

The Distributors are wholesale beer distributors operating in the Detroit area. Each of the six Distributors is separately owned and operated, except that Don Lee Distributors, Inc. (Warren) and Don Lee Distributors, Inc. (Dearborn), are both owned by a single parent company. The employees at each of the Distributors comprise separate bargaining units. For many years, the Distributors' drivers, warehouse employees, and reclamation employees have been represented for collective bargaining purposes by Local 1038, International Brotherhood of Teamsters, AFL-CIO ("Union"). In 1987, the Distributors joined forces with other beer distributors in the area to form the Downriver, Detroit, Oakland, and Macomb Wholesalers Association, Inc. ("DDOM") in an effort to negotiate more favorable terms with their respective groups of employees. Their efforts through the DDOM were successful; after a 12-week strike, the Distributors – apparently confronted with something of a "Prisoner's Dilemma" – were left to the "mercy of other . . . wholesalers" as several other DDOM members made individual deals with the Union on terms more favorable to the Union than the Distributors and other DDOM members originally had anticipated.

Dissatisfied with their DDOM experience, the Distributors decided in January 1990 to withdraw from the

association. Executives of each of the Distributors had met in December 1989 with Fred Long, the chief executive of a labor-relations firm called West Coast Industrial Relations Association, Inc. ("West Coast"), to discuss alternative ways of bargaining together to increase their bargaining power relative to the Union. Long told the Distributors that the problem with the 1987 DDOM negotiation was that the structure of DDOM permitted the Union to "whipsaw" DDOM members in the collective bargaining process.[1] To combat the whipsawing problem, Long advised the Distributors to enter into a mutual aid pact ("Pact") that provided, in pertinent part, as follows:

> 1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.
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> 2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . . .
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> * * *
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> 7. Distributors agree to the establishment of the minimum objectives, described in Exhibit B, for a new

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[1] "Whipsawing" is a "union stratagem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one." *See* Roberts Dictionary of Industrial Relations (rev. ed. 1971); *see also* Webster's Third New Int'l Dictionary (1986) ("3: to use more favorable terms gained (as in one company) as the precedent or leverage to win equal or greater concessions from (as a related company).").

Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributors shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

The "minimum objectives" mentioned in Paragraph 7 of the Pact, which vary markedly in relative specificity, were listed as follows:

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.
7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan – percentage of earnings.
12. Insurance revisions.

13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

On January 18, 1990, the Distributors signed the Pact.

As the existing DDOM contract was set to expire in May 1990, the Distributors and the Union began making plans for a new round of collective bargaining in March 1990. Early on, Long's associates (on behalf of the Distributors) broached the idea of "joint" or "concurrent negotiations," but Robert Knox, the president of the Union and the chief Union negotiator, initially rejected this idea. On March 27, 1990, the Distributors and the Union held an initial meeting to discuss collective-bargaining issues. At this meeting, Long presented a memorandum to Knox detailing the Distributors' initial position. This memorandum stated that "the bargaining positions of each [Distributor] are the same and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing department personnel representing the bulk of each bargaining unit." On the other hand, the memorandum also stated that "[i]t may also develop through the negotiating process even for delivery department or warehouse department personnel, that it is advantageous for a certain company and the union to agree

on a provision to acceptable to other companies or the union. Although the companies do not contemplate such differences, it is possible [illegible] may develop as issues are discussed. Such agreed upon differences, if any, would be incorporated into that company's contract."

At the March 27, 1990, meeting between the Distributors and the Union, Knox specifically asked Long whether the Distributors had entered into any kind of mutual aid pact. Instead of disclosing the existence and terms of the Pact, Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." Long did volunteer, however, that the Distributors had *not* pledged to negotiate exclusively through Long and that they could "retain someone else without penalty. Faced with Knox's reluctance to participate in any "joint" or "concurrent" bargaining, Long told Knox that if the Union insisted on separate bargaining, Long would conduct the bargaining session for one of the Distributors, after which a representative of one of the Distributors would insist on identical contract terms for each of the other five Distributors. Rather than participate in such a futile endeavor, Knox agreed to try the joint bargaining approach and "see how it progressed."

The first actual bargaining session was held on April 18, 1990. On that date, the parties exchanged initial proposals. Long presented six identical proposals, one for each of the Distributors. Long again refused to answer and stated that "that wasn't an appropriate subject for bargaining." Bargaining continued, with little progress, through April and most of May 1990.[2] At a bargaining session held on

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[2] Tellingly, on April 20, 1990, the Distributors sent a joint letter to their retail customers with numerous collective references: "our contract," "we are asking the union to eliminate featherbedding practices," and the like. They also formed a collective group called

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May 22, 1990, the question of whether the Distributors were engaging in joint bargaining came up again, and again Long gave a somewhat evasive answer that suggested that certain Distributors could well end up agreeing to different contract terms. Despite this response, on June 8, 1990, Long wrote to Knox making clear that the Distributors would have a common, identical position on all major subjects of collective bargaining: Long stated that *[w]e* are coming close to having everything *we* need to refine *our* first proposal next week. . . . *We* will have our position on this issue refined soon. . . . *[O]ur* economic package, as it may develop in negotiations, will be conditioned on resolution of non-economic language and specifically elimination of restrictive provisions *we* define as featherbedding." (emphasis added). Sure enough, at the June 19, 1990, bargaining session, the Distributors once again presented six identical proposals, one for each Distributor.

In the late June and early July 1990 bargaining sessions, the Union representatives began insisting on separate bargaining. The Distributors vigorously resisted this idea, stating through Long at one point that "[t]he contract for all the distributors we represent is essentially identical . . . . [W]e believe that this ploy . . . represents nothing more than yet another dilatory tactic on your part." Nonetheless, the Union went forward with its plan, identifying specific issues unique to particular Distributors. For example, on July 16, 1990, the Union presented a comprehensive proposal covering only the Powers Distributing Co. Bargaining unit. On July 18, 1990, the Union proposed implementing a "daily route bidding system" at Don Lee (Dearborn). In response to these individualized proposals, the incongruously responded

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the Coalition for Job Preservation, publishing letters in local newspapers to similar effect.

with six identical counterproposals – even though the Union had made no proposal with respect to four of the six Distributors. On August 8, 1990, after the Distributors mysteriously made identical counterproposals despite the uniqueness of the Union's two Distributors-specific proposals, the Union requested that Long's associate, Chris Thomas, provide a copy of all documents showing the relationship between West Coast and the Distributors. Thomas refused to provide the requested documents, stating that they were confidential.

On September 5, 1990, Thomas informed the Union that the Distributors' counterproposals on the route-bidding issue – the issue raised by the Union only with respect to one of the Distributors – were withdrawn because the Union had not responded to them. On September 11, 1990, West Coast transmitted what is called the Distributors' final offer, making clear that the Distributors were presenting "complete and identical" offers. At the same time, West Coast declared an impasse because of the apparent futility of further negotiations over such issues as compensation for drivers and co-payment of health care premiums. At the next bargaining session, on September 20, 1990, Knox specifically asked the Distributors whether there was "a written or oral document that binds you distributors together in any way." Two different Distributor representatives specifically said that there was no pact of any kind among the Distributors.

Between October 1990 and January 1991, several bargaining sessions were held at which the Union attempted to get the Distributors to consider Union proposals that raised issues unique to particular Distributors. The Distributors essentially rejected these overtures, continuing to assert that the Distributors had identical positions on all issues. Finally, on January 14, 1991, Thomas sent Knox a letter by certified mail stating:

> Mr. Knox, *we are at impasse at Eastown, Don Lee Pontiac, Don Lee Dearborn, Oak, Powers, and Hubert.* Each has the same identical position on the ten (10) key items herein noted amongst others. If there is no agreement on these ten (10) items, there can be no agreement with any of them.

On January 30, 1991, the Distributors simultaneously notified the Union that they would unilaterally implement the non-economic portion of their final offer on February 7, 1991. On April 10, 1991, the Distributors notified the Union that they would implement the economic portions of their final offer on April 15, 1991.

The parties held another bargaining session on July 12, 1991. At this session, an attorney for the Union requested production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union's attorney also specifically asked whether "there were any penalty provisions amongst the distributors." Thomas, representing the Distributors, declined to provide the requested information. Thomas later took the position that the Pact was subject to the attorney-client privilege because Long (whose signature does not appear on the Pact) is a member of the Michigan bar.[3]

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[3] We recognize that the record contains some evidence suggesting that West Coast disclosed at least the existence of some kind of agreement early in the negotiations. For two reasons, we do not discuss this evidence in detail. First, in reviewing the NLRB's order our only task is to ascertain whether substantial evidence supports the order, and not to irrespective of whether there is evidence that could support a contrary conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Second, the disclosure of the *existence* of the Pact is immaterial to the legality of the Distributors' conduct. As explained below, an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA. Thus, the question is whether the Distributors

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Several months later, two individual distributors unilaterally changed the conditions of employment for Union members in ways that are contested in this case. In November 1991, Don Lee (Dearborn) changed its drivers' routes based solely on the drivers' performance, without regard to seniority, and without the opportunity to bid on routes that had been respected under the 1987 DDOM contract. In July 1992, Powers Distributing informed its drivers that it would discipline any driver who returned an improperly filled empty can collection bag (referred to by the Union as Powers's new "can bag" policy), despite the fact that under the 1987 DDOM contract drivers were not penalized for inadvertently returning less-than-full bags of aluminum cans for recycling.

II

Because the Distributors assert a limitation defense, we find it useful to summarize in detail the procedural history of this case; in doing so, we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date.[4]

The charge at issue in this case was filed by the Union on April 3, 1991. The charge alleged simply that "[i]n the

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disclosed the *terms* of the Pact, not merely whether the Distributors disclosed its existence.

[4] For example, in March 1990 (three months after the Distributions entered into the Pact), one of the Distributors failed to produce a copy of the Pact in response to a subpoena that requested "[a]ny and all documents . . . pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred Long, Patrick Jordan, or the firm of McLaughlin and Irvin from January 1, 1988 to the present.

six months prior to the filing of this Charge, the Employer[s] ha[ve] violated Section 8(a)(5) of the [National Labor Relations] Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse." On June 20, 1991, the Regional Director of the NLRB declined to use a complaint with respect to the Union's allegations. In particular, the Regional Director concluded that there was no evidence that the Distributors had unlawfully engaged in multiemployer bargaining without the Union's knowledge or consent:

> The investigation revealed that above six Employers all secured the services of the same labor relations consulting firm to represent them in their efforts to reach agreement with the Charging Union regarding a collective bargaining agreement. The Employers admittedly sought the same contract language and bargaining to that end.
>
> The parties met regarding each of the six companies on a rotating basis. There is no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit. Nor is there any evidence that, in the event an overall agreement is reached, that the Employers intend not to bargain individually over issues which might pertain to each respective company. I conclude that the Employers are permitted to bargain in a group with a single representative of their choice and to negotiate for identical language in their collective bargaining agreement with the Charging Union.[5] .

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[5] The Union, as intervenor, has opposed the Distributors' motion to take judicial notice of the Regional Director's decision, although the NLRB has not (and, indeed, has stipulated to its authenticity). Pursuant to Fed. R. Evid. 201, we have held that it is

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In reaching this decision, the Regional Director did not have the benefit of seeing the text of the Pact.

The Union appealed the Regional Director's refusal to issue a complaint based on the Distributors' alleged unlawful multiemployer-bargaining practices. In connection with this appeal, Long wrote a letter to the NLRB's Office of Appeals in which he stated that, while the Distributors did have a "mutual aid pact," it was solely for the purpose of sharing the cost of negotiations and contained no provision "that would restrict [the individual Distributors'] bargaining." On July 28, 1992, the Office of Appeals sustained the Regional Director's decision, stating that "the evidence was insufficient to meet the burden of establishing that [the Distributors] had entered into an agreement to restrict separate agreements by the parties or that [the Distributors] had attempted to combine all the bargaining units into one unit." The record before the Office of Appeals did not include a copy of the Pact.

Notwithstanding his initial refusal to file a complaint, on July 26, 1991, the Regional Director did issue a complaint challenging two specific aspects of the Distributors' February 1991 actions: their imposition of a longer probationary period for new employees, and their new classification of "casual" employees. Shortly thereafter, the Regional Director amended the complaint to challenge the legality of the Distributors' unilateral implementation of its economic proposals in April 1991 without first reaching a bona fide impasse.

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appropriate to take judicial notice of "adjudicative facts" such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue. *See, e.g., United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993).

The Distributors did not produce a copy of the Pact until the beginning of the administrative hearing in this matter (on November 16, 1992), after a subpoena had been issued for its production. Shortly thereafter, the General Counsel moved to amend the complaint to allege that the Pact,

> which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, [the Distributors] bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, [the Distributors'] multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge.

Over the Distributors' objection, the administrative law judge ("ALJ") granted the General Counsel's motion to amend the complaint.[6]

After a lengthy hearing, the ALJ ruled in favor of the General counsel in an opinion dated December 1, 1994. The ALJ found that the Pact created an unlawful multiemployer bargaining collective that rendered the entire course of the Distributors' conduct toward the Union unlawful. Accordingly, the ALJ ordered "that all Respondents . . .rescind the February 7 and April 15, 1991 implementations of the last, best, and final offers and restore all terms and

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[6] Among other things, the Distributors argued that the proposed amendment was time-barred by the six-month limitation period applicable to charges of unfair labor practices under the NLRA. The ALJ concluded that the amendment was not time barred, both because the Distributors had fraudulently concealed the existence and substance of the Pact, and because the multiemployer-bargaining allegation was closely related to the original allegations of the complaint.

conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new causal employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. . . . I shall order Powers to remove that discipline [for violation of the new "can bag" policy] from the employees' personnel files . . . ."

In a decision and order dated November 8, 1996, a three-member panel of the NLRB essentially adopted the reasoning and order of the ALJ. The Distributors' petition for review, and the NLRB's cross-petition for enforcement, followed shortly thereafter.

III

It is particularly appropriate, in light of the parties' radically divergent views of the record evidence, to emphasize before addressing the merits of this case that we must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as whole, even if evidence also exists that possibly could support a conclusion different from that reached by the NLRB. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951).

A

The NLRA requires employees to bargain in good faith with the designated representative of a defined bargaining unit of the employer's employees. *See* 29 U.S.C. § 158(a)(5). The duty to bargain in good faith is limited to issues of wages, hours, and other terms and conditions of employment – the so-called mandatory subjects of bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). However, when a party so strenuously refuses to bargain on a nonmandatory subject (such as the scope of the bargaining unit) that the result is an impasse, that party violates Section 8(a)(5) of the NLRA.

See NLRB v. Borg-Warner Corp., 356 U.S. 342, 348-50 (1958).

Following the principle that an impasse caused by absolute insistence on a particular bargaining unit is a violation of the duty to bargain in good faith, the NLRB and the courts have held that "joint bargaining" or "multiemployer bargaining" – either by a group of employers who refuse to bargain separately, or by a group of separate employee bargaining units who refuse to do so – without the other party's consent constitutes unlawful insistence on a nonmandatory subject, namely, the expanded scope of the bargaining unit. *See, e.g., Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enf'd*, 490 F.2d 1383 (6th Cir. 1974) (finding union to have violated NLRA by "insisting that final settlements of the collective-bargaining contracts covering separate units of employees of Ohio Power, Central Operating, and Wheeling Electric be withheld until final agreement was reached between the Respondents and the Employers in all the units in which the bargaining was taking place.). On the other hand, both the NLRB and the courts also have recognized that "coordinated bargaining," a practice whereby parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually, is lawful under the NLRA. *See, e.g., General Electric Co.*, 173 NLRB 2523 (1968), *enf'd*, 412 F.2d 512, 514 (2d Cir. 1969).

The principal question presented by this case is whether the Pact created an unlawful multiemployer bargaining relationship among the Distributors, or whether the Pact merely reflected a lawful agreement to form a coordinated bargaining group within which each member would retain independent contract-making authority. There are no "magic words" that distinguish an agreement for unlawful multiemployer bargaining from a simple coordinated bargaining agreement. *See City Roofing Co.*, 222 NLRB 786, 789 (1976), *enf'd sub nom. NLRB v. R.O. Pyle Roofing*

Co., 560 F.2d 1370 (9th Cir. 1977). Instead, the task of a reviewing agency or court is to examine the totality of the circumstances surrounding the agreement to determine whether the signatories truly retain independent bargaining authority, or whether the group of signatories retains effective veto power over the bargaining behavior of individual group members. *See Utility Workers*, 203 NLRB at 239 ("a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal pattern of conduct").

Here, the record is replete with evidence that the Distributors in fact conducted unlawful multiemployer bargaining. For example, while the Pact specified several seemingly flexible bargaining goals, it also laid down several specific non-negotiable contract terms applicable to all Pact signatories. See *supra*, at 5-6 (specifying, for example, "[c]ooler and basement deliveries required," "no curfew," "no restrictions on number of part-time employees," and "common expiration date"). The Pact further provided a huge financial penalty to any Distributor that either deviated from any of the specific contract terms or negotiated directly with the Union; such a Distributor would have to pay $400,000 to each other party to the Pact, a total of $1.6 million for each violation.[7] Perhaps most tellingly, no Distributor ever offered a contract proposal different from that offered by every other Distributor, even when the Union made a proposal addressing an issue unique to a particular Distributor, an identical counterproposal was always forthcoming from all six Distributors.

Against this factual backdrop, the Distributors argue that the Pact in fact reflected only an innocent coordinated-

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[7] Because Don Lee (Warren) and Don Lee (Dearborn) were owned by the same parent company, they collectively count as only one Distributor for purposes of the Pact.

bargaining strategy. The Distributors advance three principal arguments: first, they argue that the Pact did not actually confer "veto" power on the collective; second, they assert that, contrary to the ALJ's finding, the Distributors did not "reach an agreement . . . about exactly what they wanted" in the Pact; and third, they contend that the Pact's requirement that the Distributors not negotiate "directly" with the Union did not necessarily preclude individual agreements with the Union. The Distributors' arguments misapprehend the scope of substantial-evidence review. The ALJ's conclusion that the Pact effectively conferred collective veto power on the Distributors is supported both by the Pact language imposing a $1.6 million fine on any Distributor that reached an agreement with the Union consistent with the express provisions set out in the Pact, and by the fact that no Distributor provided an individual offer (even in the face of Distributor-unique proposals offered by the Union). With respect to the ALJ's finding that the Pact reflected an *ex ante* agreement on "exactly" what the Distributors wanted in their contracts, it is true that some of the Pact's contract provisions are vague (e.g., "[m]ore restrictive grievance procedure"); however, other provisions are quite specific and leave no room for negotiation (e.g., "[n]o curfew"). Finally, on the issue of whether the "no direct negotiation" clause precluded individual Distributors from reaching individual agreements with the Union, the ALJ certainly was entitled to infer from the Distributors' actual behavior that the Pact precluded such agreements. The fact is that, even when presented with Distributor-specific proposals that had no application or relevance to any other Distributor, each of the six Distributors responded with an identical counterproposal. On this record, there is at least substantial evidence – we would be more likely to call it overwhelming evidence – that the Distributors were engaged in unlawful multiemployer bargaining without the Union's consent.

B

The Distributors' secondary argument is that, even if their conduct constituted unlawful multiemployer bargaining, the General Counsel's complaint focusing on this charge was untimely. Section 10(b) of the NLRA provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." 29 U.S.C. § 160(b). "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988). Here, the Distributors argue that the multiemployer-bargaining charge is time barred because the Union should have been aware of the Pact by July 1990, but did not lodge a complaint with the Regional Director until April 1991. Alternatively, the Distributors argue that the six-month limitations period ran between the date on which the Regional Director declined to file a complaint on the multiemployer-bargaining issue (October 1991) and the date on which the issue was revived via the General Counsel's motion to amend (February 1993). In response, the NLRB argues that it is entitled to tolling of the limitations period both because the multiemployer-bargaining allegation is closely related to other, timely-filed allegations contained in the complaint, and because the Distributors fraudulently concealed the substance of the Pact during the entire course of collective bargaining.

There are at least two generally recognized exceptions to the six-month filing rule. First, a complaint may be amended to add allegations relating to conduct more than six months old as long as the conduct occurred no more than six months before the filing of the charge underlying the complaint, and as long as the allegations in the amendment are closely related to that charge. *See, e.g., Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1108 n.1 (6th Cir 1994); *Truck Drivers & Helpers Union. Local No. 170 v. NLRB*, 993 F.2d 990, 1000 (1st Cir. 1993). Relying on its decision in *Redd-I, Inc.*, 290

NLRB 1115 (1988), the NLRB ruled here that the multiemployer-bargaining amendment was timely because it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached. The NLRB reasoned that "the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses."

The Distributors' primary argument against application of the "closely related" exception to the six-month limitations period is that the date on which the Pact was signed (January 18, 1990) was almost 15 months before the date on which the original charge was filed (April 3 , 1991). This argument is nonresponsive. The Union's complaint is based not on the Distributors' act of signing the Pact, but on their behavior during the entire course of collective bargaining. It is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary argument. Secondarily, the Distribution assert that there is insufficient factual commonality between the multiemployer-bargaining charge and the charges contained in the original complaint to support a "closely related" finding. Under the substantial evidence test, however, we must affirm the NLRB's decision because the record demonstrates that the amendment involved the same statutory provision, required assessment of the same Distributor conduct implicated in the original complaint charges, and demanded consideration of the same evidence. The amendment, after all, need not be identical to the charges contained in the original complaint; it need only be "closely related," and the NLRB has shown substantial

evidence here that it is. *Cf. United States Can Co. v. NLRB*, 984 F.2d 864, 867 (7th Cir. 1993) (affirming NLRB's finding that amendment was "closely related" to original complaint allegations because substantial evidence supported agency's finding that new allegations involved same basic employer conduct a sold allegations).

The second generally recognized exception to the six-month filing requirement is fraud, and we would be hard-pressed to disagree with the NLRB's finding that the Distributors fraudulently concealed the terms of the Pact. Fraudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period. *See, e.g., Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), *enf'd*, 785 F.2d 304 (4th Cir. 1986); *cf. Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988) (recognizing fraudulent concealment doctrine but finding facts insufficient to toll limitations period). Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment. The Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session. The Distributors' responses were generally evasive (*e.g.*, Long's statement to Knox that the existence of the Pact was "none of his business and that it was not relevant to bargaining," *see* J.A. at 1556), and were sometimes downright untruthful (*e.g.*, the statement of two Distributor representatives that there was no mutual aid pact at all, *see id.* at 1780). During the Regional Director's investigation, no copy of the Pact was produced; it was not until an administrative subpoena was issued in connection with the hearing before the ALJ that anyone other than the Distributors saw the text of the Pact.

Even were we inclined to accept the Distributors' argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the Distributors kept the *terms* of the Pact a closely-held secret. Not only did the Distributors go so far as to ignore a

subpoena in another proceeding demanding production of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms – going so far as to say, for example, that there was no penalty to any Distributor for negotiating directly with the Union, or for using a negotiator other than West Coast, *see* J.A. at 1674, when the Pact clearly prohibited such acts on pain of a substantial financial penalty. In the face of these facts, the Distributors' main argument against invocation of the fraud exception – that "[t]he Union and the General Counsel failed to exercise due diligence" – borders on the disingenuous. Moreover, it is no answer to say that the Union possibly knew that a pact existed when they clearly did not know its terms; the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms. Accordingly, we hold that the NLRB correctly invoked the fraudulent concealment doctrine and properly permitted the complaint as amended to go forward.

C

The parties raise a number of other issues: the Union argues that Powers Distributing's unilateral "can bag" policy was unlawful (independent of the legality of the Pact) and that certain conditions imposed by some of the Distributors were inconsistent with the Distributors' final offers, and the Distributors argue that the Union's own bad faith during the course of the collective bargaining precludes a finding against the Distributors. Because we affirm the NLRB's order finding that the Distributors' entire course of conduct was unlawful, and therefore that no valid impasse was reached that would permit any Distributor to implement a "final offer" unilaterally, we need not address the Union's arguments. With respect to the Distributors' argument, we agree with the District of Columbia Circuit that where a party to collective bargaining imposes an unlawful precondition to bargaining – as here, where the Distributors

essentially conditioned bargaining on the Union's acceptance of the Distributors' multiemployer bargaining unit – that party's conduct excuses the other party's obligation to bargain in good faith. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978).[8] The essence of the NLRB's ruling in this case is that, by secretly entering into a pact that restricted the right of the individual Distributors to negotiate with the Union, the Distributors collectively had agreed in advance not to budge on a nonmandatory bargaining subject. The Union's subsequent bad faith, if there were such, is therefore irrelevant.

IV

For the foregoing reasons, the Distributors' petition for review of the NLRB's order id DENIED, and the NLRB's petition to enforce its order is GRANTED.

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[8] Unlike this case, the District of Columbia Circuit was confronted with a situation where the union, rather than the employer, imposed the unlawful precondition. The principle, however, is the same. Translating the District of Columbia Circuit's reasoning into the context of this case, we hold that "if [an employer] insists on speaking on behalf of persons for whom it cannot properly so insist, [a union] cannot be faulted for refusing to bargain." *Local 777*, 603 F.2d at 911 (quoting *NLRB v. Kelley Bros. Nurseries, Inc.*, 341 F.2d 433, 440 (2d Cir. 1965) (Friendly, J.)).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors, Co., Hubert Distributors, Inc., and Oak Distributing Co. and Local 1038, International Brotherhood of Teamsters, AFL-CIO

West Coast Industrial Relations Association, Inc. ***and*** **Local 1038, International Brotherhood of Teamsters, AFL-CIO and Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors, Co., Hubert Distributors, Inc., and Oak Distributing Co., Parties of Interest.**
Cases 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896, 7-CA-32986, 7-CA-33649, 7-CA-33707, and 7-CA-31302

NOVEMBER 8, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On December 1, 1994, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a reply to the Respondents' exceptions and an answering brief. The Charging Party filed cross-exceptions and an answering brief to the Respondents' exceptions. Respondents filed a reply to

the Charging Party's answering brief. Respondents Don Lee Dearborn, Don Lee Warren, Powers, Eastown, and Oak filed a brief in reply to the General Counsel's answering brief; Respondent Hubert filed a separate reply brief. Respondents Don Lee Dearborn, Don Lee Warren, Powers, Eastown, and Oak filed an answering brief to the General Counsel's cross-exceptions and an answering brief to the Charging Party's cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended order as modified.[3]

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[1] The Respondents have requested oral argument. The General Counsel and the Charging Party filed oppositions. The request is denied as the record, exceptions, and briefs adequately present the positions of the parties. In addition, the request was untimely. See Sec. 102.46(i) of the Board's Rules and Regulations.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents filed numerous exceptions to the judge's factual findings, most of which do not have merit; however, we correct a few inadvertent factual errors which do not affect the decisions. The Union was not party to successive collective-bargaining agreements with a multiemployer association known as DDOM; rather, the Union was party to successive bargaining agreements with various multiemployer associations which merged in 1987 to form DDOM. Further, the record shows that Powers Distributing Company first became aware of a problem with empty can credits in 1991, not 1992 as the decision states. The record also shows that rather than counting all bags of returned cans, Powers counted only randomly selected or specially identified bags. Finally,

(continued...)

1. We agree with the judge, for the reasons he stated, that the Respondent Companies violated Section 8(a)(5) and (1) by engaging in joint bargaining without the Union's knowledge or consent. Despite the Companies' protestations that they were, instead, engaged in lawful coordinated bargaining—i.e., each employer making its own entirely independent decision on contract terms, although coordinating its negotiations with the other employers—the credited evidence speaks otherwise, as the following summary demonstrates.

The Respondent Companies, six beer distributors who were formerly members of various multiemployer associations that had had successive contracts with the Union, resigned from a multiemployer association to which they had all belonged and, in 1990, entered into a "mutual aid pact" in which they agreed to 22 "minimum

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(continued . . .)

the Respondents excepted to the finding that on May 22, 1990, Respondent Negotiator Long did not respond to Union Negotiator Knox's request for the mutual aid pact. The record shows that the pact was not specifically mentioned at that session, although the Union questioned whether the parties were not, in fact, engaged in joint bargaining.

We find, contrary to the judge, that the Respondents were competitors under the circumstances of this case, where, even though they had defined brands that did not overlap, the companies competed with each other for shelf space. However, the Respondents' status as competitors does not affect the result in this case.

[3] The General Counsel has excepted to the judge's inadvertent failure to include in the Order and notices make-whole language from the remedy section of his Decision and Order. We find merit in that exception and modify the Order. In addition, we modify the unit description in sec. IV and Appendix C to include two omitted classifications and modify Appendix G to include "like or related" language which was inadvertently omitted.

We shall further modify the judge's recommended Order and the appendices in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

objectives . . . for a new Collective Bargaining Agreement." These objectives included, in addition to economic terms, such noneconomic terms as a management-rights clause, a more restrictive grievance procedure, and a zipper clause. The agreement further provided that the objectives could be changed only by a majority vote of the six signatories to the pact, and that any distributor who breached the agreement, negotiated directly with the Union concerning any of the 22 objectives, or agreed to settle on any "terms and conditions in excess of those listed" would be liable for a "penalty fee" of $400,000 to each of the other distributors. The chief spokesman for the Companies, Fred Long, made it clear from the start of negotiations that the Companies intended all the agreements to be "basically identical"; but, the terms of the mutual aid pact—most notably each Company's potential liability of $2 million to the other Companies for agreeing to terms "in excess" of those contained in the objectives—was not disclosed to the Union until the hearing in this case.

Because deviation from the objectives could be achieved only by a majority vote, three Companies could veto another company's contract, and enforce this veto with the agreed-on financial penalty. By entering into the pact, therefore, each Company effectively lost its freedom to make the ultimate decision regarding provisions of its contract with the Union, ceding that decision to the other Companies as a group. In keeping with that agreement, as the judge found, the Companies did bargain in effect as a single group up to and including their implementation of final offers.

The conduct is unlawful under Board precedent that—although developed mainly under Section 8(b)(3) of the Act, which requires unions to bargain in good faith—applies equally to the conduct of employers, which have a good-faith bargaining obligation under Section 8(a)(5). It is a violation of the statutory bargaining obligation for either a union or an employer to insist to impasse on a nonmandatory subject of bargaining, i.e., a subject that does not concern the terms and

conditions of employment in the bargaining unit to which the employer's recognitional obligation extends. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Change in the scope of a bargaining unit is a nonmandatory subject. When either employers or unions which have in the past bargained in separate units begin, without the consent of the other side, to bargain jointly as if bargaining for a single contract, they are engaging in unlawful insistence on a nonmandatory subject. "Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units." *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). Thus, the Board held unlawful the pooled ratification procedure at issue in *Paperworkers Local 620 (International Paper)*, 309 NLRB 44, 45 (1992), because a system allowing parties outside a given bargaining unit effectively to veto an agreement on a contract for that unit is a system "that allows for refusal to sign an agreement on the basis of a nonmandatory subject of bargaining," i.e., a subject that does not "concern the wages, hours, and working conditions of the unit covered by that agreement."

In the present case, as noted above, the secret pact of the Respondent Companies created a system, enforced by substantial financial penalties, by which the votes of the Companies outside a particular bargaining unit could block agreement on a contract by the bargaining parties in that unit. Even though the views of the other Companies expressed in those votes concern terms and conditions of employment, they are extraneous considerations so far as the bargaining unit whose agreement the outsiders seek to veto is concerned. Because the pact was secretly carried out, it was effectively imposed on the Union without its consent and therefore constituted unlawful insistence.

As we agree with the judge that the bargaining was unlawful from its inception, and that, therefore, all subsequent unilateral implementations of the Respondents' offers were unlawful and must be rescinded, we do not reach the issue of whether the Respondents' implemented proposals on casual employees were unlawful under *McClatchy Newspapers*, 299 NLRB 1045 (1990), remanded 964 F.2d 1153 (D.C. Cir. 1992), decision on remand 321 NLRB 1386 (1996), and *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). With respect to probationary employees, we agree with the judge's basis for finding no violation, and thus we need not pass on the cases cited above.

2. The Respondents have excepted to the judge's rejection of their contention that the allegations of unlawful joint bargaining were time-barred under Section 10(b) of the Act, and, in particular, to his holding that those allegations were permissible, because they were closely related to a timely filed charge within the meaning of *Redd-I*, 290 NLRB 1115 (1988). In applying the doctrine of *Redd-I*, the judge found inter alia that the "joint bargaining" complaint amendment was identical to a portion of the charge that had been dismissed. Under *Redd-I*, however, the issue is whether an amendment is closely related to a viable portion of a charge, not to a dismissed or withdrawn portion. Id. at 1116. In the instant case, we find that the joint bargaining allegation was closely related to the charge allegation of unilateral implementation before impasse (which became a part of the complaint). Applying the *Redd-I* factors, we note: the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses.

In any event, as the judge found, the amendment was appropriate for the additional reason that the Respondents' fraudulent concealment of the existence of the pact tolled the 10(b) period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that:

I. Respondents Don Lee Distributor, Inc. (Warren), Warren, Michigan; Don Lee Distributor, Inc. (Dearborn), Dearborn, Michigan; Powers Distributing Company, Inc., Warren, Michigan; Eastown Distributors, Co., Highland Park, Michigan; Hubert Distributors, Inc., Pontiac, Michigan; and Oak Distributing Co., Inc., Waterford, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with Local 1038, International Brotherhood of Teamsters, AFL-CIO by agreeing with other employers to form a multiemployer association or bargaining coalition and bargaining with the Union while concealing the agreement and without securing the consent of the Union to engage in such bargaining.

(b) Unilaterally implementing offers made during collective-bargaining negotiations with the Union without first having bargained in good faith to impasse with respect to terms and conditions of employment that they implemented.

(c) Unilaterally implementing wage rates that are inconsistent with offers they made during collective-bargaining negotiations.

(d) With the exception of Hubert, unilaterally determining the wages to be paid to their casual employees, without bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the entire February 7, 1991 implementation, including, but not limited to, the implementation of the new casual employee classification and new casual employee classification and new probationary employee clause, and the entire April 15, 1991 implementation, including, but not limited to, the implementation of the elimination or reductions of hourly wage rates and holiday and vacation pay, and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to their employees, with interest computed in the manner set forth in the remedy section of the judge's decision.

(b) Make all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes.

(c) Make whole employees for the implementation of a wage inconsistent with the Respondents' last offers to the extent that the employees were harmed thereby, with interest.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, Don Lee Warren shall post at its facilities in Warren, Michigan, copies of the attached notice marked "Appendix A"; Don

Lee Dearborn shall post at its facilities in Dearborn, Michigan, copies of the attached notice marked "Appendix B"; Powers shall post at its facilities in Warren, Michigan, copies of the attached notice marked "Appendix C"; Eastown shall post at its facilities in Highland Park, Michigan, copies of the attached notice marked "Appendix D"; Hubert shall post at its facilities in Pontiac, Michigan, copies of the attached notice marked "Appendix E"; Oak shall post at its facilities in Waterford, Michigan, copies of the attached notice marked "Appendix F."[4] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, any of the Respondents have gone out of business or closed a facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondents at any time since December 14, 1990.

(f) Within 21 days after service by the Region, file with the Regional Director sworn certifications of responsible officials on forms provided by the Region attesting to the steps that the Respondents have taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

II. Respondent Don Lees Distributor, Inc. (Warren), Warren, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Warren), at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

III. Respondent Don Lee Distributor, Inc. (Dearborn). Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally assigning work to its casual employees at times that are inconsistent with offers made during collective-bargaining negotiations.

(b) Unilaterally changing its route-bidding procedures and route assignments of its employees without bargaining with the Union.

(c) Removing protected literature from an employee bulletin board, thereby disparately enforcing its rules with respect to the use of its bulletin board.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those drivers and warehouse employees who were on layoff status at the times when it unilaterally assigned casual employees to perform warehouse and driving work and at times other than those provided in its last, best, and final offer, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days from the date of this Order, offer those of its regular employees whom it terminated when their layoff status was extended for more than 6 months by reason of its employment of casual employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(d) Rescind its route-bidding procedures and route assignments and reinstate its route bidding procedures and route assignments as they existed prior to November 18, 1991.

(e) Make whole those employees who were detrimentally affected by its unilateral change of their mute assignments and route-bidding procedures in the manner set forth in the remedy section of the judge's decision.

(f) On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment and other terms and conditions of employment in the following unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Dearborn), at its Dearborn, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

IV. Respondent Powers Distributing Company, Inc., Warren, Michigan., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it would commence disciplining them for their failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures.

(b) Disciplining its employees for their alleged failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind any warnings or other discipline issued to its employees Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks for their alleged failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures, remove any reference to such discipline from all its files, and, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

(b) On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment

in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Powers Distributing Company, Inc., at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

V. Respondent Eastown Distributors, Co., Highland Park, Michigan, its officers, agents, successors, and assigns., shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, and hand loaders, employed by Eastown Distributors, Co., at its Highland Park, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VI. Respondent Hubert Distributors, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the

following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert Distributors, Inc., at its Pontiac, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VII. Respondent Oak Distributing Co., Inc., Waterford, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit. which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees. forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Oak Distributing Co., Inc., at its Waterford, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VIII. Respondent West Coast. Los Gatos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening a representative of Local 1038, International Brotherhood of Teamsters, AFL-CIO that two of its clients would kill the representative if they thought that they could get away with it.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, West Coast shall post at its facilities in Los Gatos, California, copies of the attached notice marked "Appendix G."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of this notice to all current employees and former employees employed by the Respondent at any time since December 14, 1990.

(b) Within 14 days after service by the Region, forward a sufficient number of signed copies of the notice to the Regional Director for Region 7 for posting by the Union at its office and meeting halls in places where notices to employees am customarily posted, should the Union agree to do so.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

WEST COAST INDUSTRIAL RELATIONS ASSOCIATION, INC.

Tinamarie Pappas, Esq. and *Mary Beth Foy, Esq.*, for the General Counsel.

Patrick W. Jordan, Esq. (Keck, Mahin & Cate; Julie Collins Nelson, Esq., and *Steven N. Yang, Esq.*, on the brief), of San Francisco, California, for Respondents Don Lee (Warren), Don Lee (Dearborn), Powers, Eastown, and Oak.

Fred R. Long, Esq. and *Kevin L. Dorhout, Esq.*, of Los Gatos, California, for Respondents Hubert and West Coast.

Samuel C. McKnight, Esq. and *Steve Wolock, Esq. (Klimist, McKnight, Sale, McClow & Canzano, P.C.)*, of Southfield, Michigan, for Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint in this lengthy unfair labor practice proceeding alleges that the Company Respondents did not reach a lawful impasse in their negotiations with the Charging Party Union and were not entitled to implement the provisions of their last, best, and final offers, made on September 13, 1990. The complaint also alleges other violations of the National Labor Relations Act (the Act). Respondents denied that they violated the Act in any manner.[1]

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[1] The relevant docket entries are as follows: Local 1038, International Brotherhood of Teamsters, AFL-CIO filed charges

(continued...)

Jurisdiction is conceded. Don Lee Distributor, Inc. (Warren) (Don Lee Warren), Don Lee Distributor, Inc. (Dearborn) (Don Lee Dearborn), Powers Distributing Company, Inc. (Powers), Eastown Distributors, Co. (Eastown), Hubert Distributors, Inc. (Hubert), and Oak Distributing Co., Inc. (Oak; all the Company Respondents being referred to as Respondents or Companies) are Michigan corporations and are engaged in the wholesale distribution of beer at their various facilities located in the metropolitan Detroit area. During the year ended October 30, 1992, they severally had gross revenues in excess of $500,000 and purchased beer products valued in excess of $50,000 for their various Detroit area locations directly from sellers located outside Michigan. I conclude, as they admit, that each of them has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also

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(continued . . .)

against West Coast in Case 7-CA-31302 on December 14, 1990, and a complaint issued on January 31, 1991. The Union filed charges on April 3, 1991, against Don Lee (Warren) in Case 7-CA-31719(2), against Don Lee (Dearborn) in Case 7-CA-31719(3), against Powers in Case 7-CA-31719(4), against Eastown in Case 7-CA-31719(5), against Hubert in Case 7-CA-31719(6), and against Oak in Case 7-CA-31719(7). Amended charges in Cases 7-CA-31719(2)-7 were filed by the Union on April 26, 1991. The Union filed its charge in Case 7-CA-32164(1) against Don Lee (Dearborn) and Don Lee (Warren) on August 2, 1991. The Union filed its charge in Case 7-CA-32896 against Don Lee (Dearborn) on February 10, 1992, and amended it on February 11 and March 16. The Union filed another charge to Case 7-CA-32986 against Don Lee (Dearborn) on March 2, and amended it on March 16 and 19. The charge in Case 7-CA-33649 against Powers was filed by the Union on August 26, 1992, and the charge in Case 7-CA-33707 against Don Lee (Warren) and Don Lee (Dearborn) was filed an September 10, 1992. The first complaint issued on July 29, 1991, and subsequent complaints issued on September 30, April 28, August 28, and October 30, 1992. The hearing was held in Detroit, Michigan, on about 60 days between November 16, 1992, and October 26, 1993.

conclude, as Respondents admit, that Local 1038, International Brotherhood of Teamsters. AFL-CIO (the Local being referred to as the Union and its international being referred to as the International or Teamsters), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. Finally, I conclude that West Coast Industrial Relations Association, Inc. (West Coast), a California corporation, has served as labor consultant to, and the representative of, Respondents, acting on their behalf within the meaning of Section 2(13) of the Act. During the year ended December 31, 1990, West Coast performed services valued in excess of $50,000, of which services valued in excess of $50,000 were performed in and for various enterprises located in States other than California. I conclude that it, too, has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The following employees of Respondents constitute units appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Warren), at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.
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> All full-time and regular part-time driver-salesmen. helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees, and breaker pile employees employed by Don Lee Distributor, Inc. (Dearborn), at its Dearborn, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees, and breaker pile employees employed by Powers Distributing Company, Inc. at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, and hand loaders employed by Eastown Distributors, Co., at its Highland Park, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert Distributors, Inc., at its Pontiac, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Oak Distributing Co., Inc., at its Waterford, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

For Many Years the Union has been the exclusive bargaining representative within the meaning of Section 9(a) of the Act of Respondents' employees described above, having been party to successive collective-bargaining agreements covering the units with a multiemployer association, the Downriver, Detroit, Oakland. Macomb Wholesalers Association, Inc. (DDOM), of which the Companies were members. I conclude, as Respondents admit, that the Union, by virtue of Section 9(a) of the Act,

has been, and is now, the exclusive representative of the employees in the units described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment. and other terms and conditions of employment.

The most recent DDOM contract had a term of three years and expired on May 1, 1990. The Companies were unhappy with that contract. There were certain cutbacks and alterations to the contract that they had wanted, but they were outvoted by the other DDOM members; and so they determined to resign from the association and negotiate the changes that they wanted. Enter Fred Long, the chief executive officer of West Coast. West Coast had wide experience representing employers in the beer distributing industry, and Long has persuaded many employers that the wages and benefits provided by Teamsters contracts were too high and that his negotiating skills would eliminate many of the benefits that those contracts contained and cut costs, and that the numerous and broad services he provided would successfully counter any economic or other action that the Teamsters would take.

Representatives of several of the Companies met with Long in Chicago in November 1989, and he eventually persuaded them and the other Respondents that he and West Coast would afford them the best services for negotiating on their behalf. On January 18, 1990, they retained him in a document they called a "mutual aid pact." The agreement stated, in relevant part:

> WHEREAS, each of [Respondents] is a Distributor of beverages and in Employer of employees represented by [the Union] which has a collective bargaining agreement with each Distributor and;
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> WHEREAS, each Distributor is desirous of correcting and/or improving the language and economics of its respective collective bargaining Agreement with said Union to reflect more nearly

market supply and demand conditions, to correct unreasonable health & welfare and pension costs for the benefits received and to negotiate improvements in operational efficiencies, and;

WHEREAS, the Union has had a history of striking or bringing pressure to bear on certain Distributors or certain groups of Distributors to force bad Agreements on all Distributors that are fraught with operational inefficiencies, featherbedding practices, excessive costs and practices which restrict and hamper Distributors rights, and;

WHEREAS, each Distributor can offset the Union's bargaining power by entering into a mutual aid agreement and coordinated bargaining effort.

THEREFORE, IT IS AGREED AS FOLLOWS:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.

Respondents agreed to share the costs and expenses of the services of "Long and his associates who shall represent the [Respondents'] bargaining efforts with the Union," which services included the preparation and conduct of negotiations. They also agreed to share the costs of any strike called against one, some. or all of them for 90 days and "to the establishment of . . . minimum objectives . . . for a new Collective Bargaining Agreement which can only be changed by [their] majority vote," as follows:

1. Eliminate eight (8) hour minimum/maximum day. [The DDOM agreement provided that: "Five (5) consecutive work days, or forty (40) work hours, shall constitute a normal full time week's work. Nothing contained herein is construed to provide a guaranteed

work period, except that eight (8) consecutive work hours, other than the lunch period, shall constitute the minimum normal day's work for a driver and a full time warehouseman."]

2. Remove load limit. [The DDOM agreement provided that employees could deliver only a certain number of cases each week. The number varied, depending on the time of the year, with the most deliveries permitted from May 1 to September 15, the peak season for the consumption of beer.]

3. Overtime after forty (40) hours per week.

4. Management rights clause. [The DDOM agreement contained no such clause.]

5. More restrictive grievance procedure.

6. Single pay holidays. [The DDOM agreement provided for 12 paid holidays, of which 8 were paid double. Thus, the employees were paid for 20 days.]

7. Simplified vacation language.

8. Four (4) weeks maximum vacation, red circle everyone over. [The DDOM agreement provided for five weeks of vacation, with all employees who received more being red-circled.]

9. Cooler and basement deliveries required. [Many of the beer retailers placed their cases in coolers and basements. The DDOM agreement provided: "Delivery Drivers and Helpers shall not be required to place bottled or canned beer in customers ice boxes or coolers or to remove empties therefrom; and Delivery Drivers or Helpers shall not climb ladders or other objects in or on customer's premises to deliver beer or pick up empty cases. . . . Basement deliveries, and/or deliveries above the first floor, and the removal of empties from basements and/or other than the first floor, will not be permitted."

10. Reduction in wages.

11. Refined benefit pension plan--percentage of earnings.

12. Insurance revisions.

13. No curfew. [The DDOM agreement permitted drivers to leave the warehouse no earlier than 7 a.m. for drivers assigned to an eight-hour day and 6:30 a.m. for drivers assigned to a ten-hour day. Most 8-hour employees had to return to the warehouse by 5 p.m. and 10-hour employees by 5:30 p.m.]

14. Bulk deliveries. [There was no provision for bulk deliveries in the DDOM agreement. The Union's president and principal negotiator, Robert Knox, described them as specially designated routes, on which the drivers would travel only to large volume stops.]

15. Zipper clause. [The DDOM agreement contained no zipper clause.]

16. Empty pick up rate. [The drivers were required to pick up cases of empty bottles and bags of empty cans.]

17. Longer probation period.

18. No restrictions on number of part-time employees.

19. Reduction on commission when helper is used.

20. More flexibility with reclamation duties. [Michigan law required the collection and processing of empty beverage containers.]

21. Common expiration date.

22. Minimum three year contract.

The agreement concluded with the following paragraph 8:

> In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed . . . above [the 22 items], that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributions [sic] shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

Neither the Union nor the General Counsel had seen the pact until Respondents produced it in compliance with a subpoena issued early in this proceeding. At that time, the status of the complaint's principal allegations was as follows: The original charges in Cases 7-CA-31719(2)-(7) alleged that Respondents had violated Section 8(a)(5) "in the six months prior to the filing of [the] charge . . . by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a bona fide impasse." Respondents implemented almost all of their final offers on February 7, 1991, except for various economic proposals, including wages and the reduction of holiday and vacation pay.[2] They implemented those on April 15, and the Union amended its charges to add those additional unilateral implementations. The Regional Director found probable cause to believe that Respondents bargained in bad faith by its implementations in February, but only with respect to two of its proposals, the longer probationary period and the employment of persons under a new classification of casuals, reserving to Respondents "virtually total control" over their terms and conditions of employment, even though casuals could constitute up to 50

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[2] Respondents' implementations are contained in Thomas' letter, dated January 10, 1991. G.C. Exh. 122.

percent of the unit. This portion of the complaint was based solely on *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). In addition, the Regional Director found that Respondents violated Section 8(a)(5) by implementing those proposals and all the April 15 economic changes without having reached a valid impasse. The first complaint was based on those theories alone.

The complaint was not based on the additional theory of the Union's unfair labor practice charges, that Respondents engaged in multiemployer bargaining without the Union's consent. The Union appealed the Regional Director's refusal to issue a complaint on that ground, but the General Counsel's Office of Appeals sustained the decision because, as stated in its letter of July 28, 1992: "[T]he evidence was insufficient to meet the burden of establishing that [Respondents] had entered into an agreement to restrict separate agreements by the parties or that [Respondents] had attempted to combine all the bargaining units into one unit." By so finding, the Office of Appeals must have agreed with Long's letter, dated July 6, 1992, defending the Regional Director's decision:

> Union alleges Employers engaged in illegal coalition bargaining. Employers, at the very first bargaining session with union offered in writing to meet on either a coordinated basis or individual Employer basis with union. Union's initial written proposal to Employers in March 1990 was identical for all Employers. All prior agreements between union and Employer [sic] were identical in terms and conditions for all Employers. Coordinated bargaining lasted from March to June 1990 whereupon union insisted all further meetings be by individual Employer only. Employers conceded to union demand although they told union its actions were designed to stall and prolong negotiations. Union alleges Employer [sic] had some kind of agreement

making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay [for?] negotiations, security protection if a strike occurred and related [sic].[3] None of the parties entered into any agreement that would restrict their bargaining. However, all of them would periodically agree on common positions they wanted to take during negotiations so they couldn't be whipsawed by the union.

After Respondents produced the mutual aid pact at the beginning of the hearing, the General Counsel moved to amend the complaint to allege that not just the unilateral implementations complained of in the original complaint were invalid, but all the new terms were, because the pact, which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, Respondents bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, Respondents' multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge. I granted the General Counsel's motion to amend. Respondents contend that the amendment was untimely, barred by the Act's Section 10(b) 6-month statute of limitations. I disagree.

In *Winer Motors*, 265 NLRB 1457 (1982), the Board prohibited the revival, outside of the applicable 6-month limitations period, of any allegation contained in a withdrawn charge. In *Ducane Heating Corp.*, 273 NLRB

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[3] This typographical omission undoubtedly refers to services for which West Coast's costs were to be shared.

1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), the Board held that the same rule would apply to charges that were dismissed. The Board held, however, in both situations, that a resurrection of a charge outside the applicable limitations period would be permitted if there were "special circumstances in which a respondent fraudulently concealed the operative facts underlying the alleged violation." *Ducane,* supra at 1390.

Redd-I, Inc., 290 NLRB 1115 (1988), involved neither a dismissed nor withdrawn charge. There, the union filed a timely charge alleging that employee Kelley, as well as eight other employees, had been illegally discharged on August 19, 1985. Thereafter, it withdrew that charge, but filed a new charge on January 6, 1986, alleging that the same employees, except Kelley, had been illegally discharged. On March 3, it amended the charge to add seven other employees who were laid off on August 15; and on May 6, it requested that its charge be further amended by adding Kelley. At the hearing 2 days later, the General Counsel moved to amend the complaint to include an allegation concerning Kelley's discharge. The Board permitted the amendment, finding that a distinction must be made between a dismissed or withdrawn charge containing certain allegations sought to be revived and a charge that is still pending. If the allegations are closely related to what was alleged in the existing charge, then the amendment should stand if the otherwise untimely allegations "are of the same class as the violations alleged in the pending timely charge . . . [and] arise from the same factual situation or sequence of events . . . and [if] a respondent would raise the same or similar defenses to both allegations." Id. at 1118; *Fiber Products,* 314 NLRB 1169 (1994).

The original charges in Cases 7-CA-31719(2)-(7) were never dismissed or withdrawn. They are still pending. The amendment encompasses each charge in its entirety, including that portion of which the General Counsel

originally refused to issue a complaint when the Office of Appeals found missing from the Union's proof "an agreement to restrict separate agreements." Now, with the revelation of the pact, the complaint alleges that the pact restricts each Company's right to negotiate directly with the Union or negotiate its own agreement because the pact mandates 22 goals that can be modified only by majority vote of all the Companies. The amendment merely reinstates what the original charges had alleged as bargaining in bad faith. Thus, those allegations not only are closely related to what was alleged in the existing charges but also are identical to that portion about which the General Counsel had refused to issue a complaint. So, too, are all the new allegations which complain that Respondents implemented their entire offers without reaching a valid impasse. Just as the Board permitted Kelley to be added as an alleged disciminatee in *Redd-I,* the new complaint adds all the rest of the February implementations. Obviously, then, the new allegations are of the same class as the violations alleged in the pending timely charges, as *Redd-I* dictates.

In addition, the amendment arises from the same factual setting or sequence of events. An element of reaching a lawful impasse, in determining whether Respondents' other unilateral implementations violated the law, is the parties' good faith. The Board's oft-quoted test is set forth in *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cit. 1968), as follows:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

To determine whether a legal impasse was created before the implementations that the original complaint sought to remedy, even in the absence of the General Counsel's claim that Respondents were guilty of bad-faith bargaining, the parties would have had to detail all the bargaining sessions preceding the implementations. The parties did that in this proceeding. The amendment changes barely a whit the proof that would have been offered had the amendment not been made. Concededly, a new theory has been added, but the complaint still involved a consideration of all the elements that must be analyzed under *Taft Broadcasting*. The amendment also involves the same Section of the Act.[4] The conduct is thus "similar" and with a "similar object" as *Redd-I* requires. Finally, although Respondents have added some defenses denying that they were bargaining as if they constituted a multiemployer group, almost all of their 12 defenses apply to the original allegations. The only new affirmative defense specifically aimed at the amendment is a claim that, assuming that they engaged in multiemployer bargaining, the Union consented to it. Because there are no facts in support of this defense that Respondents would not have elicited anyway, they presented the same evidence in this proceeding as they would have, had there been no amendment. I thus conclude that all the requirements of *Redd-I* have been met.

In addition. even if the allegations of the unfair labor practice charge were not "closely related" and the charge had been dismissed in its entirety, I would still permit the amendment under *Ducane Heating*. From the very beginning of negotiations, Knox asked for pacts and agreements, but he has received none. Respondents contend that they did not fraudulently conceal the existence of the pact, but that is not accurate. At the first negotiating session

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[4] But see *Fiber Products*, supra at fn. 3.

on March 27, 1990, when Knox asked whether there was a mutual assistance pact. Long said only that Respondents have an "understanding."[5] When Knox pursued his request, Long said that he was going to ask his clients not to respond because it was not a relevant subject; so Knox could take his answer as "no response." At the second session on April 18, Knox again asked whether the Respondents formed a group or a coalition, and Long responded that that was "none of [Knox]'s business" and refused to answer. On May 22, Long again did not respond to Knox's request for the pact. The subject of the existence of a pact was raised again on June 27, after Chris Thomas, an associate of Long, had replaced Long as Respondents' principal negotiator, but Thomas did not respond to Knox's request for the document.

On August 8, Knox asked for all documents showing the relationship between West Coast and Respondents. Thomas then stated that they were confidential. On September 20, Knox asked about any written or oral agreement between Respondents about negotiations. Both Bob Gustafson, vice president of marketing of Hubert, and Van Goethem denied the existence of the pact. On July 12, 1991, 3 months after the Union filed its charges in Cases 7-CA-31719(2)-(7), Steve Wolock, a union attorney, demanded any mutual aid agreement "or anything like that," because the Union had to know whether there were "any restrictions or any limitations among the parties." For the first time, Thomas admitted that there was such an agreement but said that he would have to see the relevancy of it to the Union and then asked, if he showed it, whether the Union would bargain with Respondents "as a group." Then, Thomas wrote to Wolock saying that the document was written by Long and was

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[5] In a unit clarification proceeding held several weeks before, Don Klopcic Jr., Don Lee Dearborn's president, and Bob Van Goethem, general manager of Don Lee Warren and comptroller of Don Lee Dearborn, denied that there was any agreement with Long.

protected by an attorney-client privilege. Respondents would be willing to show it if Wolock showed its relevance and supplied "case authority" where the relevance has been upheld by the Board. Wolock supplied the relevance, but Respondents complain in their brief that the Union supplied no legal authority.

Thus, for 16 months, until July 12, 1991, and even as late as July 6, 1992, when Long wrote to the Office of Appeals, Respondents concealed the existence of the pact. Neither Long nor Thomas was truthful and candid about its existence and, without the subpoena issued in this proceeding, it is likely that no one would be aware of its contents even now. I do not agree with Respondents' contention that, if the Union wanted the pact so badly, it should have brought some legal proceeding, such as filing an unfair labor practice charge, to get it. First, I have substantial doubt that the Union would even be entitled to complain of Long's refusal to produce a "mutual aid pact." Respondents do not assert that a mutual aid pact has any relevance to a labor organization in the ordinary course of bargaining, and I have found no legal authority for this proposition, either. Second, Board law should not fault the Union when its failure to pursue a remedy is caused by Respondents' refusal to comply with the Union's requests, particularly when Klopcic Jr. and Van Goethem lied about its existence, Long fraudulently concealed the pact's contents and, as shown below, the Union repeatedly questioned the bona fides of the Companies' asserted "coordinated bargaining."

Finally, even if Respondents had somehow hinted at the existence of the pact in such a way that the Union should have divined its existence, Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel. No one knew that the pact prohibited each of Respondents from bargaining directly with the Union or agreeing to terms and conditions which

did not meet the minimums. No one knew that, if one Company strayed from what the others wanted, it subjected itself to damages of at least $1,600,000. [Don Lee Dearborn and Don Lee Warren appear to be treated as a single employer for the purposes of the pact.] And no one knew that Long's letter to the Office of Appeals misstated that the pact did not "restrict" Respondents' bargaining and that the pact related only to "sharing costs to pay [for?] negotiations, security protection if a strike occurred and related [sic].[6] In addition, Long misstated to the Union the contents of the pact, at the first bargaining session, by denying that there would be a penalty if one Company bargained directly with the Union, as follows:

> Knox: Is there a mutual assistance aid pact?
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> Long: We have an understanding that our positions throughout the negotiations [are the] same and except with some minor exceptions are the same with regard to any specific agreements by and between them. In terms of how they intend to prepare themselves, if you will, from a pact funding point of view, I don't know.
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> Knox: Do they have the right at any point to say: okay, we want to go off on our own?
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> Long: Sure.

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[6] In so concluding, I find little difference between Long's misstatement of the contents of the mutual aid pact and Respondents' denial that they were engaged in multiemployer bargaining. Both would be considered "fraudulent concealments" under *District Lodge 64 Machinists v. NLRB.* 949 F.2d 441 (D.C. Cir. 1991), remanding *Brown & Sharpe Mfg. Co.,* 299 NLRB 586 (1990); on remand 312 NLRB 444 (1993). Perhaps the time is ripe for the Board to reconsider its past reluctance to consider denials as constituting sufficient acts of concealment that might extend the 10(b) period. After all, the Union filed a timely charge, and it was not at fault when Respondents acted as they did.

Knox: Away from you?

Long: Sure.

Knox: Without penalty?

Long: If they wish to go with someone else as far as I'm concerned they can go do it.

The agreement provides that a Company cannot bargain directly with the Union. If it did, it would subject itself to the penalty set forth in paragraph 8.

Respondents contend that I may not consider evidence of events prior to October 3, 1990 (6 months before April 3, 1991, the date of the charges), because of Section 10(b). Each charge complaining of the first implementation, which occurred on February 7, 1991, was timely filed, less than 2 months later. Each amendment was also timely filed, within 2 weeks of the second implementation. The portion of each charge alleging bad-faith bargaining was limited to the 6 months before the filing. The General Counsel concedes that I can go back no further than October 3, 1990, because the charge was not amended; but that is too restrictive. In *Redd-I*, the Board permitted consideration of Kelley's layoff, despite the fact that no amended charge had been filed. Furthermore, under the Ducane theory, because the mutual aid pact was fraudulently concealed, it is appropriate to consider all evidence occurring within 6 months of the date that Respondents first concealed its contents. It is more appropriate to adopt that earlier date. Otherwise, Respondents benefit from their refusal to reveal to the Union (or anyone else, for that matter, including the Office of Appeals) the contents of the pact and from their misrepresentation of the same. In addition, the Union should not suffer merely because it suspects a violation and files a charge that it cannot prove because of Respondents' concealment and misrepresentation. Instead, had it not filed a charge and then discovered the existence of the pact, it would have been able to file a new charge and introduce any

evidence, without regard to the 6-month statute of limitations. *Fiber Products*, 314 NLRB 1169 at fn. 2. Accordingly, I have considered all the evidence in support of the complaint, without regard to date. All the evidence prior to October 3, 1990, is clearly appropriate as background, in any event, just as in any bad-faith bargaining case.

Respondents additionally contend that paragraph 8 of the pact does not mean what it says, that it does not prohibit all Companies from individually bargaining with the Union settling on term not agreed upon by the others at any time. Rather, their intent was to prohibit that conduct only in the event of a strike. I ruled at the hearing that Respondents had no right to rely on parol evidence to prove that "intent," because paragraph 8 was unambiguous, but I gave them leave to contend in their briefs that I was incorrect. I am not persuaded by their arguments.

The ambiguity that they rely on results from paragraph 1, quoted above at page 5, which provides that Respondents are engaged in coordinated bargaining and that "nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit" and paragraph 8, which states that any Company that does not bargain with the others or negotiates with the Union more favorable terms than the minimums set forth in the pact is subject to damages. But the inconsistency does not create an ambiguity. There are not two or more possible meanings contained in paragraph 8, and there is no inconsistency in the agreement. Rather, the first paragraph contains merely a self-serving statement regarding the manner that Respondents hoped that their agreement would be legally interpreted, while paragraph 8 imposes on Respondents specific restrictions on their ability to negotiate separately. Respondents' attempt to insert into that paragraph the words "only in the event of a strike" would limit the occasions when it becomes effective. By so doing, the insertion, rather than explaining or clarifying the agreement's intent, "would

instead invalidate and nullify the written agreement." *Beech & Rich, Inc.*, 300 NLRB 882 (1990); *W. J. Holloway & Son*, 307 NLRB 487 (1992). Compare *Operating Engineers Local 3 (Joy Engineering)*, 313 NLRB 25 fn. 2 (1993).

Respondents contend that neither the General Counsel nor the Union may object to Respondents' proffer of the intent of the pact because the parol evidence rule is binding only on those persons who are parties to the document. But this is too broad a statement of the rule. As stated in 3 Corbin, Contracts, Sec. 596 (rev. ed. 1960):

> The question has been raised whether the "parol evidence rule" is applicable in favor of or against a third party who was not a party to the written integration. The answer is definitely in the affirmative if the rule is correctly stated and understood. If two parties have by a written complete integration discharged and nullified antecedent negotiations between them, they are so discharged and nullified without regard to whoever may be asserting or denying the fact.
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> There are numerous cases laying down the contrary rule to the effect that parol evidence that might be inadmissible as between the two parties to a written contract is admissible when offered for or against a third party. The actual decision in these cases can usually be sustained on the ground that the evidence tended to show that the integration was not complete and should have been heard and weighed even as between the parties to the writing. [Fns. omitted.]

Professor Wigmore also criticizes the phrasing of this rule, contending that: "This form of statement suffices in most instances to reach correct results; but it is not sound on principle." 9 Wigmore, *Evidence § 2446* (Chadbourn rev. 1981). As he explains:

> The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes. . . . Hence. so far as that effect and those purposes are concerned, they must be found in that writing and nowhere else, no matter who may desire to avail himself of it. But so far as other effects and purposes are concerned, the writing his not superseded their other conduct, nor other persons' conduct, and it still may be resorted to for any other purpose for which it is material, either by other persons or by themselves.
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> . . . .
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> [After distinguishing a number of decisions] The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances *for the very purpose for which the writing has superseded them as the legal act.* [Emphasis added.]
>
> Nevertheless, owing to the inaccurate phrasing of the doctrine as commonly laid down that the rule does not apply to others than the parties to the document the precedents are often arbitrary and confused, and cannot be reconciled by any general distinctions. [Fn. omitted.]

Accord: *Commissioner of Internal Revenue v. Dwight's Estate*, 205 F.2d 298, 301 (2d Cir. 1953), and cases cited therein. Even the decisions relied on by Respondents, while expressing the rule criticized by Corbin and Wigmore, are otherwise distinguishable. In *Great West Casualty Co. v. Truck Insurance Exchange,* 358 F.2d 883 (10th Cir. 1966), while noting that the parol evidence rule is "ordinarily" applied to issues between the parties to the contract and not to third parties, the court found that a stranger to the contract could use parol evidence because the insurance contract in question was uncertain whether it covered trucks leased by the insured to others where the lease agreement required the lessee to provide casualty insurance. In *Thorsness v. United*

States, 260 F.2d 341 (7th Cir. 1958), although relying on the same exception that Respondents do. the court specifically found that the agreement was ambiguous and uncertain and that, in any event, no objection had been made to the parol evidence. Finally, in *Landa v. Commissioner of Internal Revenue*, 206 F.2d 431 (D.C. Cir. 1953), the court allowed parol evidence to explain the word "indebtedness," which in the circumstances might be defined as alimony, as the taxpayer insisted. Landa's holding is criticized in *C.I.R. v. Danielson*, 378 F.2d 771, 779 (3d Cir. 1967).

Here, however, there is no ambiguity that permits an exception to the parol evidence rule. Furthermore, contrary to Respondents' contention, the pact is not covered under the same rules established by decisions dealing with collective-bargaining agreements and the alleged relinquishment of a right protected by Section 7 of the Act, which generally permit the receipt of extrinsic evidence. *Indianapolis Power Co.*, 273 NLRB 1715 (1985), remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986), decision on remand 291 NLRB 1039 (1988). Rather, Respondents seek an interpretation of the pact clearly at variance with its terms. If one company were suing another Company for a violation of the pact, parol evidence would not be permitted. *NDK Corp.*, 278 NLRB 1035 (1996). Here, the provision of the pact is unambiguous, and parol evidence is "not only unnecessary but irrelevant." *NLRB v. Electrical Workers MEW Local 11*, 772 F.2d 571, 575(1985).

Respondents' argument that the qualification of a strike should be read into paragraph 8 under the principles of ejusdem generis also has no merit. That rule of interpretation provides that "general words following a detailed enumeration will be confined to things of the same kind . . . as the particular matters mentioned," 18 Williston, Contracts Sec. 1968 (3d ed. 1978); *Black's Law Dictionary* at page 517 (6th ed. 1990); and specific words following

general ones restrict application of the general term to things that are similar to those enumerated. 2A Sutherland, *Statutory Construction* Sec. 47.17 (1992 rev.). The pact contains no detailed enumeration of anything, no recitation of similar events. and no sequence or series. The agreement contains nine paragraphs, only three of which (numbered 3, 5, and 6) pertain to the event of a strike. The inclusion of that language in those paragraphs does not dictate that like language should be included in any or all of the other paragraphs, particularly paragraph 8.

Finally, I discredit all oral testimony that seeks to persuade me that the words "in the event of a strike" was meant to be included in the last paragraph. The agreement recites that all Respondents, by signing the agreement, acknowledged that they had carefully read the pact and understood their respective obligations. I find it improbable that they would have signed an agreement exposing themselves to such enormous damages if they decided to proceed separately at any time, when they meant to limit that damage provision to apply solely to the limited situation of a strike. I also find that each Company committed itself to the payment of Long's fees and would hardly have welcomed other Companies removing themselves from the group, leaving the remainder responsible for a greater share. In addition, their testimony would make redundant the first half of paragraph 6, which provides:

> Each Distributor in the event the Union calls a strike against any one, some or all Distributors shall take no action inconsistent with the purpose of this Agreement; nor shall any Distributor not struck seek to take advantage of said strike conditions to the detriment of the struck Distributor or any of them.

The purpose of the agreement is the correction of what Respondents perceived to be the inequities of the DDOM agreement by a joint commitment to proceed together and protect one another. Respondents' actions are consistent with

this purpose. Thus, they retained the same negotiator, Long and his company, West Coast, which would be paid by all the Companies in the same ratio, regardless of whether its services for one were lengthier than any other. For example, if negotiations were held for Eastown and lasted only an hour, but negotiations for Don Lee Dearborn lasted 10 hours, the Companies' share of Long's fee would not change, demonstrating that all the negotiations were intended to benefit all the Companies equally. Indeed, the pact provided that Respondents share not only the costs of West Coast's services specifically described in the agreement but also "[o]ther services a majority of [Respondents] may authorize." Thus, a Company would have to pay for West Coast's services that company did not want, but three others did.

Respondents planned their demands jointly. Almost as a rule, representatives of all the Companies attended each of the negotiations. They caucused together. They presented a solid front at each session. They made their proposals at the same time. They explained their positions jointly. They made the decision jointly to declare impasse and declared impasse at the same time. They implemented their proposals at the same time. They wrote the same letters. They hired, through West Coast, a company to recruit strike replacements. They advertised in newspapers, as "The Coalition for Jobs Preservation," attempting to persuade the public of the righteousness of their cause, stating: "We will do our best to avoid disruptions in service or supply of our brands to our consumers due to our difficulties with the Teamsters." As the Coalition, they wrote their retailers. referring to "our contract" and "our new offer." Long, too, referred to them as a group, complaining that other employers did not join them *"because they were afraid!!"* Long hoped his letter (March 23, 1990) would "take the edge off your [Respondents'] concerns about *perfecting a final offer* amongst you. . . . Our concern is how quickly we reach

an impasse and savings (if an agreement is not possible as I believe)."

Paragraph 6 of the pact provides that the purpose of the agreement shall not change should the Union strike. The commitment to act together remains. Thus, a struck Company shall not deal directly with the Union in order to extricate itself from the strike, nor make any contract that has not been approved by the majority. So read, paragraph 6 would merely duplicate paragraph 8 if Respondents' position that paragraph 8 applied only in the event of a strike were sustained. I find, to the contrary, that paragraph 6 was intended to bolster Respondents' commitment if a strike occurred. Thus. I reject Respondents' contention that paragraph 8 does not mean exactly what it states. In so doing, I have carefully reviewed Respondents' extensive arguments devoted to an almost word-by-word examination of the pact to explain paragraph 8's relationship to the rest of the pact, in order to persuade me that it must be read differently. With due regard to the ingenuity of counsel, I simply find no different meaning. I reject all the arguments.

The theory of the amendment to the complaint is that Respondents' professed coordinated bargaining was nothing more than a ruse for multiemployer bargaining, that their bargaining was in bad faith, and that they were not entitled to implement any of their proposals. It is Board law that both parties must agree to multiemployer bargaining. That is solely consensual, and Respondents could not force upon the Union their desire to bargain as a group. As stated by the administrative law judge in *Utility Workers Local III (Ohio Power Co.,* 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974):

> The duty imposed on employers and labor organizations by the provisions of the National Labor Relations Act to bargain collectively is predicated on the cardinal principle that the existing unit, whether established by certification or voluntary recognition,

> fixes the periphery of the bargaining obligation. An employer and a union may voluntarily agree to merge separate bargaining units for the purposes of contract negotiations, but the enlargement of bargaining units is not a mandatory subject for collective bargaining under the terms of the Act.[7] Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other Units.[8]

There is no formal organization necessary to support a finding of a multiemployer group. *Frito-Lay, Inc. v. Teamsters Local 137,* 623 F.2d 1354 (9th Cir. 1980), cert. denied 449 U.S. 1013 (1980), and 449 U.S. 1112 (1981). "Substance rather than legalistic form is all the Board has ever required in multiemployer bargaining." *Town & Country Dairy,* 136 NLRB 517, 523 (1967); *Metz Brewing Co.,* 98 NLRB 409, 410 (1952). To form a multiemployer group, individual employers need only express an unequivocal intention to be bound in collective bargaining by group rather than individual action. *Komatz Construction Co.* v. *NLRB,* 458 F.2d 317, 321 (8th Cir. 1972). The fact that the employers may bargain "separately" over minor issues that may apply to them individually does not negate a conclusion that they otherwise engaged in joint bargaining because separate negotiations over some items is not inconsistent with group negotiations for a labor agreement. See, e.g.. *The Kroger* Co., 148 NLRB 569 (1964), which

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[7] Cf. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 164; *NLRB v. Borg-Warner Corp.*, 356 U.S. 342.

[8] *Standard Oil Co. v. NLRB*, 332 F.2d 40, 45 (C.A. 6, 1963); *Douds v. International Longshoremen's Association*, 241 F.2d 278 (C.A. 2, 1957); *NLRB v. South Atlantic & Gulf Coast Longshoremen's Association*, 443 F.2d 218 (C.A. 5, 1971). See also *United Mine Workers v. Pennington*, 381 U.S. 657, 666-667.

illustrates that the employers may be part of a multiemployer unit, even though they sign separate agreements, rather than being bound by one master agreement.

Respondents counter that they were engaged in coordinated bargaining and not multiemployer bargaining. Even before bargaining began, West Coast. in a 1990 article, *Collective Bargaining and the Beverage Wholesaler,* explained its understanding of group or multiemployer bargaining and coordinated bargaining, as follows:

> *Group Bargaining*
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> All wholesalers band together into one association and execute a single agreement with the union that covers all wholesalers equally for the most part. Unions like associations since they can whipsaw[9] the weak links by otherwise striking them and not the others who may be stronger. The employer's answer is a lock out at the non-struck wholesalers operations. Since lock outs are fraught with pitfalls, including the inability to hire permanent strike replacements, group bargaining is not as effective as coordinated bargaining.
>
> *Coordinated Bargaining*
>
> All wholesalers band together and select a common bargaining spokesman, but each wholesaler makes independent decisions and has its own independent contract with the union. This form of bargaining, if done correctly, can produce the maximum bargaining

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[9] *Roberts Dictionary of Industrial Relations* (rev. Ed. 1971) defines "whipsawing" as: "A union strategem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one."

power for wholesalers. Unilateral implementation of the respective wholesaler's final offer after impasse is the ultimate power tool. Utilizing a lock out can almost always be avoided. The union either accepts the wholesalers offer or refuses to accept. In the latter case, if the union does not strike, employees nevertheless work under the terms and condition of the wholesaler's final offer. If the union does strike, workforce can be permanently replaced with a distinct possibility the union will be decertified. Since the union knows or should know this, they will be more reluctant to strike and more likely to reach an agreement favorable to the wholesaler.

When Respondents' method of bargaining was first mentioned to the Union, it was defined as "concurrent" and not "coordinated." On March 6, 1990, before the opening of negotiations, West Coast Attorney Patrick Jordan wrote to Knox that the Companies were "prepared to meet with you jointly and engage in concurrent negotiations." Knox replied on March 15 that he had not agreed to meet jointly or to engage in concurrent negotiations, stating that he did not even know what that meant. Jordan wrote back on March 21:

> As I understand it, you do not understand how five employers can bargain on an individual basis with a union, in the absence of a multi-employer group. As I explained to you, these employers have withdrawn from the multi-employer group and have unqualifiedly stated their desire to bargain on an individual basis. In doing so, the employers are prepared to meet with you concurrently and, as I have represented. the proposals they will be submitting to you are for all intents and purposes virtually identical save and except for those areas in which they may desire to make separate proposals.

At the opening of negotiations on March 27, 1990. Long suggested that the Union engage in concurrent, coordinated bargaining, so that all the Companies would attend the bargaining sessions simultaneously. Long conceded that the issues would be somewhat different with Eastown, for example, which delivered 40-ounce bottles; no other Company did. Eastown did not have a reclamation department; all other Companies picked up empty bottles and reprocessed them under Michigan's reclamation act. Only Powers employed mechanics, and it was the only Company with mechanics in its bargaining unit. (Only Hubert employed assistant drivers.) Otherwise, the Companies expected and intended to reach identical agreements. However, the companies would be signing separate agreements, and if them were separate issues, the negotiations could break down into subcommittees. Long recognized that, if Knox refused to participate in concurrent bargaining, Long had to permit separate bargaining, but threatened that, if Knox wanted separate sessions for each Respondent, Long would come to the first session for the first employer and Tom Vella, Hubert's administrative general manager, who had a law degree (he became the Respondents' notetaker), would attend the sessions for the other five employers, agreeing to no more and no less than what Long did in the first meeting. Knox reluctantly agreed to the "concurrent" bargaining, adding that he would see how it progressed.

Thirteen "concurrent" sessions were held, the last on June 27, 1990, when Knox told Thomas that he was dissatisfied with the concurrent bargaining, that it was not making any progress, and that it appeared to be no more than joint bargaining because all the Companies were taking the same position even when the Union was trying to talk to one Company. He asked to meet separately with each Company, believing that there were different needs among all of the Companies that he hoped to explore and that certain smaller Companies would more likely make peace than the larger

ones. Thomas was unhappy. He did not want separate bargaining. He had tried that in Buffalo with another Teamsters local and it did not work. However, he said that the Union had that right and agreed to individual bargaining. but stated that Knox's request was solely for the purpose of delay. Thereafter, the negotiations were held, allegedly with each Company individually, almost always on a rotating basis; but the physical appearance of the negotiations did not change. Thomas was still the principal negotiator, except on those occasions when Long returned, but representing a different Company at each session; and the representatives of the individual Companies became the members of the bargaining committee for the Company that was then bargaining and were present at each meeting thereafter, as the committee for the Company whose turn it was to negotiate.

There was nothing inherently wrong that those same representatives should continue to be present at each negotiating session. If anyone can agree on what "coordinated bargaining" is about, at least there should be agreement that representatives of other unions or employers may be present at discussions which do not directly and immediately affect their own interests. Board law makes clear that parties to negotiations generally have the right to designate whomever they want to participate as their representatives. So, typically, one Company could have representatives of other Companies serve on its negotiating committee. But the right is not unrestricted. The representatives may not be "so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining," *General Electric Co.*, 173 NLRB 253, 254 (1968) (fn. omitted), enfd. as modified 412 F.2d 512 (2d Cir.

1969);[10] and they may not be representatives where there is other evidence of bad faith or ulterior motive that the party is engaged in a subtle plot to bring about bargaining in a unit broader than the one the parties have agreed to or that is certified, *Standard Oil Co. v. NLRB,* 322 F.2d 40 (6th Cir. 1963), enforcing 137 NLRB 690 (1962).

General Electric, an 8(a)(5) case, held that the company had no right to refuse to bargain with a number of international unions that had established a Committee of Collective Bargaining (CCB), the purpose of which was "to formulate a set of common goals and to seek to achieve these objectives through a 'coordinated approach' to bargain with" the company. 173 NLRB at 253. To reach that conclusion, the Board had to find that the International Union of Electrical Radio and Machine Workers (IUE) was not engaged in illegal conduct. The Board found that the IUE did not intend, by adding as its representatives, members of the CCB, to bargain for anyone other than the IUE and there was no understanding that any agreement reached would be subject to the approval, disapproval, or adoption by any other union. Ibid. Because the employer left the bargaining table before negotiations began, the Board found it unnecessary to decide whether the participating unions had been locked into a conspiratorial understanding and found it unnecessary to decide whether the company could have suspended negotiations if it found that the non-IUE representatives were seeking to bargain for their own union, rather than the IUE. The Board found only that the mere presence of the outsiders was not inherently disruptive of the bargaining process.

The dissent was concerned that: "such representatives could attempt to bargain for their own unions while serving on the negotiating committee of another, or they might claim

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[10] See also *Minnesota Mining & Mfg. Co.*, 173 NLRB 275 (1968), enfd. 415 F.2d 174 (8th Cir. 1969).

to be bargaining for one union when, in fact, they were locked into an understanding that no union would sign an agreement unless all unions did." Id. at 255. The Board answered that the recognition of "the possibility of abuse is quite different from concluding . . . that abuse is inherent in any attempt at coordinated bargaining." Ibid. Rather, the Board insisted on substantial evidence of "ulterior motive or bad faith." Ibid. That evidence was lacking. Further, the Board stated, at page 256:

> [A] holding that the mere presence of "outsiders" is so inherently disruptive of the bargaining process as to privilege an employer's refusal to bargain would substantially limit the opportunity for collaboration and cooperation between unions. It would, for example, prevent an expert employed by one union from assisting another union at the negotiating table, even though the negotiating union might be seeking nothing more than technical advice from the "outside" representative. We do not believe that this kind of collaboration is inconsistent with the statutory objectives . . . .[11]

The Board has only infrequently described the kind of permissible collaboration and cooperation that parties may engage in before crossing over into the area of joint or coalition bargaining. Regarding the composition of bargaining committees, *General Electric* permits assistance from experts who represent other employers and unions. *Indianapolis Newspapers,* 224 NLRB 1490 (1976), permits the participation of the representatives of other in-plant unions, when they have no right to vote on the committee,

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[11] Obviously, the same right to determine the composition of its own bargaining committee exists for employers as well. A company's choice of negotiators, including experts from other companies, would be subject only to the kind of limitation already placed on unions.

and all such rights remained vested exclusively in those persons who were members of the negotiating union. Obviously, *General Electric* also permits other representatives to be present, but the Board never states when the point is reached when cooperation with those representatives becomes "conspiratorial" or "a subtle plot."

The Board has also found, under certain circumstances, some right to coordinate bargaining proposals without creating a larger unit. In *Frito-Lay, Inc.* v. *Teamsters Local 137,* 623 F.2d 1354, 1359 (9th Cir. 1980), the court stated that: "[U]niformity of labor standards is a legitimate union goal." In *Standard Oil,* the Board found that it was not unlawful for the unions involved to seek common termination dates for contracts covering the various units they represented. 137 NLRB at 691; *United States Pipe & Foundry Co.* v. *NLRB,* 298 F. 2d 873 (5th Cir. 1962), enfg. *Steelworkers (United States Pipe & Foundry Co.),* 129 NLRB 357 (1960), cert. denied 370 U.S. 919 (1962). In addition, unions dealing with a common employer with separate plants capable of manufacturing the same product may protect themselves by insisting that agreements be reached at all plants before any individual contract is signed because, otherwise, the employer could merely shift its production to other plants. *United States Pipe; Steelworkers (Lynchburgh Foundry),* 192 NLRB 773 (1971), enfd. 80 LRRM 2415 (4th Cir. 1972).

However, the parties may go too far. In *Standard Oil,* supra, a union violated Section 8(b)(3) by failing to sign a collective-bargaining agreement that it had agreed to, insisting that other labor organizations sign first, and those organizations were withholding their approval pending ratification of other contracts covering different bargaining units. Unions also violate the Act when they enter into pooled voting ratification procedures that require an aggregate vote of all the employees to approve each of the separately negotiated contracts, regardless of the outcome of

the vote by the employees affected by that contract. "[T]he pool's structure and operation impermissibly impose extraneous nonbargaining unit considerations into the collective-bargaining process." *Paperworkers Local 620* (International Paper *Co.),* 309 NLRB 44 (1992). Thus, wholly separate bargaining units could veto another unit's contract "on the basis of extraneous considerations having no direct bearing on the substantive terms of the other unit's contract." Id. at 45. That basis is a nonmandatory subject of bargaining. *Jefferson Smurfit Corp.,* 311 NLRB 41 (1993). Similarly, where unions have demanded and insisted that the employer had to make identical offers for all the units and that none of the unions would accept any offer relating to any one of the units until concurrent offers had been made for all of the units, a violation exists. *Utility Workers Local III (Ohio Power Co.),* supra, 203 NLRB 230. In *Frito-Lay, Inc.*, supra, the union demanded that three companies agree to either one contract covering all of them or three separate contracts containing substantially identical provisions for each company. The court found that the union's strike was aimed at forcing the three companies into a multiemployer group by reason of the demand for uniform contracts. In *Operating Engineers Local 428 (Phelps Dodge Corp.),* 184 NLRB 976 (1970), enforcement denied sub nom. *AFL-CIO Joint Negotiating Committee for Phelps Dodge v. NLRB,* 459 F.2d 374 (3d Cir. 1972), cert. denied 409 U.S. 1059 (1972), the Board found that the numerous union respondents and, through them, the *AFL-CIO Joint Negotiating Committee for Phelps Dodge,* had as one of their primary objectives the obtaining of an "agreement on terms and conditions of employment to be applicable generally on a companywide basis" and that their strikes throughout the company's facilities were intended, in substantial part, to force the

company to accede to the demands for a companywide agreement.[12]

The issue in this proceeding is whether Respondents' bargaining was coordinated, as Respondents insist, or was joint, as the complaint alleges. None of the decisions that permit coordinated bargaining allow negotiators to act as Respondents have done here. Respondents are six employers, not even competitors of one another. They seek essentially the same contracts, at the same negotiations; they are bound to proceed jointly by a pact that subjects them to substantial damages if they proceed independently; and three Companies bind the other two to any of the minimums.

Although the Companies have an absolute right to seek the best agreement they can obtain and to cut back costs and eliminate "restrictive" rules, they do not have the right, without the Union's consent, to engage in joint bargaining with the Union. What Respondents have done here is joint bargaining, and nothing more. Their bargaining has no other distinguishing qualities. When Knox asked why it was not joint bargaining, Long answered that each Company would sign a separate agreement and that there would be some minor differences in the contracts. That is not enough. *Frito-Lay* and *The Kroger Co.* hold that those facts are not indicative of separate bargaining, because there may be joint bargaining even with separate individual contracts. *Kroger* also instructs that the mere minimal differences in some of the separate contracts is not enough to transform these negotiations into truly separate negotiations representing different interests. Furthermore, Long and Jordan suggested

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[12] The Third Circuit refused to enforce the Board's decision, finding, contrary to the Board, that separate negotiations were conducted at each company's unit and no bargaining was conducted at any unit with respect to the wages and conditions of employment at any other unit.

that the Union engage in "concurrent, coordinated" bargaining. The result of the Union's acquiescence was that all the Companies simultaneously attended the bargaining sessions, and that was no different from the manner in which joint bargaining is traditionally conducted. *Frito-Lay, 623* F.2d at *1360-1361.*

Respondents contend that their proposals were those of each Company independently, but the commitments of the pact had to restrict them in their actions. When they each made the same proposals as all the others, their proposals were not independent. They were joint. And their approval of their proposals to the Union, before they were even offered, was just as much a violation as the unions' ratification of companywide contracts, because none of Respondents' proposals were going to be any different. Respondents simply jointly agreed about the contents of the contract; and that is the same as *Utility Workers Local 111 (Ohio Power), Paperworkers Local 620 (International Paper),* and *Standard Oil,* where a violation was found when no union could agree to a contract unless the other unions agreed.

Long, Thomas, and Jordan did not hide the fact that that they expected all the agreements to be basically identical and all their proposals were "basically identical." In *Operating Engineers Local 428 (Phelps Dodge Corp.),* the unions sought common contracts, at least as to all major economic issues, and the Board held that to be invalid. In *Frito-Lay, Inc. v. Teamsters Local 137,* the unions wanted identical language in all their contracts, and the Board found a violation. Although the court found no violation in *United States Pipe,* when the three unions sought common termination dates, it recognized that, by seeking the same provision, the negotiating union was seeking terms for the

other units; and that was "an apparent expansion of the scope of the bargaining unit." 298 F.2d at 878.[13] Here, the Companies sought common language as to every component of the contract, including noneconomic items such as management prerogatives. simplified vacation language, and zipper clause. Even if the Companies were direct competitors, and there is no evidence that they are, and desired to maintain equal wages and benefits, so that they would remain competitive and not lose business because they were not, there is no justification for permitting them, under the guise of coordinated bargaining, to seek a common contract, the only difference being the name on the signature line.

Joint bargaining permits bargaining for more than one employer, while coordinated bargaining is only for a single employer. In coordinated bargaining, there is true separate bargaining, but in "coordination" with others. The agreement, however, forbids any Company from directly negotiating with the Union. That is the exact opposite of what was required of each Company by the Act and the

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[13] Even *Electrical Workers IBEW Local 46 (Puget Sound)*, 302 NLRB 271, 274 (1991), relied on by Respondents, notes that: "It will always be the case that employers who make clear their intent to bargain separately may in the end decide to agree to terms mirroring those agreed to by a multiemployer group. Indeed, unions often urge such agreement without conceding that *this obliterates the boundaries between multiemployer and single employer negotiations*." (Emphasis added.) In any event, that decisions and *Walt's Broiler*, 270 NLRB 556 (1984), also relied on by Respondents, involved conduct by employers that was alleged to be inconsistent with their stated intent to abandon group bargaining. In both, the Board found that they did not intend to be bound by the multiemployer negotiations. In both, there was no issue, as here, that the employers exceeded the proper boundaries of coordinated bargaining. There is no contention here that Respondents wanted any part of the DDOM. The sole issue here is whether, under the facts of this case, Respondents bound themselves to a new group, those who were represented by Long.

opposite of any theory that permits coordinated bargaining. When separate bargaining occurs, the primary employer makes the ultimate decision regarding contract provisions. But the dictates of the pact prevent that from happening. Instead, three Companies may take control of the decisions of the party then negotiating; and that flies in the face of all the Board authority that insists that the party negotiate for itself, without extraneous matters playing a hand. And it is extraneous that three of the Companies are not willing to compromise on a matter that the principal party to those negotiations is willing to compromise. Furthermore, although unions may have a legitimate aim to see that their general wages and standards are not undercut (note that all the decisions cited above are union coordinated bargaining cases), it is more difficult to understand how legitimate employer interests are promoted by their joint insistence on the same conditions. For example, there is no reason that they must have the same arbitration clause, with the same method of selecting an arbitrator, and the same steps and time limits for presenting grievances. Yet that type of clause, as well as many others, was present in each of the allegedly separate offers made by Respondents, just as identical offers would be made, at the same time, in joint bargaining.

The Companies opted out of their prior multiemployer group (DDOM) because they were dissatisfied with being outvoted by other employers whom they thought too easily gave in to the Union. Yet they opted into a new arrangement, because they had reached an agreement with these employers about exactly what they wanted and they agreed to jointly pursue these aims and goals, under penalty of substantial penalties if any of the group backed out of its commitments. They had the courage to join together, whereas other employers did not "because they were afraid!!" That they agreed in paragraph 1 of the pact that they intended to engage in coordinated bargaining, means nothing in the face of their joint actions. I reject the import

of their self-serving declaration, as the Board did in *Paperworkers Local 620 (International Paper)*, 309 NLRB 44 (1992), where it found a violation despite the six unions' agreement that their pooled voting procedure was merely "coordinated bargaining" and that each local would "continue its independent decision making in their separate bargaining units." Long seemed to be wedded to the notion that, somehow, coordinated bargaining could thwart the Union's whipsawing, while avoiding the necessity of the employer's use of a lockout. Thus, his emphasis is not on the coordination of bargaining for the effect that it will inform the other employers about what is happening so much as it is the pressure that it will supply in the event of a breakdown. Coordinated bargaining avoids the need for lockouts, as it promotes impasse with two consequences, either a strike and the hiring of permanent replacements, or, alternatively, the imposition of the terms of the final offer. Whether the bargaining technique really does what he thought is irrelevant.[14] It is here employed merely as a tactical device and does not promote separate bargaining. The way Long went about it, with the pact and identical offers, the bargaining was joint.

Long never intended that these negotiations be with the individual Companies. His threat that, if Knox wanted separate negotiations, Long would attend the first session and he would send Vella to the next five, set the tone for the remaining negotiations. Not that there were identical discussions at each, but that separate sessions would serve not the purpose of individuality, but of sameness, that all negotiations were to result in no less and no more than the commitments made at other negotiations, and that commitments for one would be commitments for all.

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[14] Prevention of whipsawing is a purpose of joint bargaining, too. I Hardin, *The Developing Labor Law* 508-509 (3d ed. 1992).

Conversely, what one Company did not accept, no other would. As Long observed in his very first statement to the Union on March 27, 1990:

> We can meet individually for each company on a routine basis at alternative times and dates. Our bargaining committee shall, in such cases, consist of a representative from each of the six (6) facilities I represent. Our proposals shall be the same for each company. In essence, we shall have six (6) redundant meetings. Although a waste of time, we are prepared to proceed.

Thus, there was to be a lack of an individual response to problems directed at a single Company. All the Respondents proposed exactly the same provision, whether they had problems or not. For example, Knox wanted employees of Don Lee Dearborn to have the right to bid daily for their routes because he felt that that Company approached its assignments with a "reward and punishment" mentality. His solution on July 18, 1990, may have been somewhat clumsy, but at least it was aimed at what he perceived to be a problem there. However, despite that fact, all Respondents, not just Don Lee Dearborn, countered with an offer on route bidding in their next proposals. At the September 10 negotiations with Powers, Union Attorney Sam McKnight asked Bob Bloom, a Powers' representative, the reason that Powers had made a mute bidding proposal. Bloom was unsure. McKnight asked: "Do you even know what it's all about?" Thomas then interrupted, explaining, "That's off the table. That's withdrawn." When McKnight expressed his surprise, Thomas explained that the Union had not responded to Respondents' proposal during the last two sessions. McKnight pointed out that the last two sessions were negotiations with two other Companies, not Powers, with

whom the Union had not met. Nonetheless, Thomas responded: "Yes, it's withdrawn. "[15]

Another issue that Knox tried to raise individually with the various Companies was starting times, which they uniformly wanted to eliminate. After they had implemented their last, best, and final offers, Knox asked Jim Quasarano, Eastown's president, how his work assignments had changed. He replied that only two drivers had been scheduled to start at 6:45 a.m., 15 minutes before an 8-hour-a-day employee was permitted under the old contract to start, and 15 minutes later than a 10-hour employee was permitted to start.

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[15] Respondents contend that Thomas made this proposal on behalf of all Companies, in order to have something to trade. Even if I believed him which I do not, his proposal brings extraneous matters to the bargaining table, unrelated to the Union's concern about conditions at Don Lee Dearborn. Furthermore, a proposal that is unresponsive to any party's need is a prime example of bad-faith bargaining. In so finding, I note that later, the Union proposed daily route bidding to all Respondents. However, I credit Knox's explanation that, because of Respondents' withdrawal of its proposal, the only way to obtain route bidding at Don Lee Dearborn was to negotiate the same proposal with all six Companies, despite the fact that it was unimportant to the Union at the others. Knox narrated the following dialogue: On October 17, 1990, which was a negotiating session with Oak, there was a brief discussion of route bidding. Bob Gustafson said that he was really confused about the Union's position on daily route bidding because, in the past, the Union had always believed that it was healthier to have a regular driver in a given area so that he was familiar with his area and retail customers. That was also healthy for the retailer because he knew the driver when he came in, was not concerned about where he was going, and learned to trust him over a period of time. It was more efficient for the company, too, because the driver knew where he was going and could save the time of having the retailer send somebody back with him and check his work. Knox explained that it really was not the Union's proposal; it was Respondents' proposal that they gave for all six Companies, making it clear that it was really all of them or nothing. At that point, Thomas cut Gustafson short, saying "All of the distributors will give consideration to a daily route bidding providing we get rid of the job restrictions." Even then, the contract were to be identical.

Quasarano said that most of his customers were not open any earlier. When Knox asked why Quasarano wanted to eliminate all the starting times, Thomas interrupted with the answer that if a customer wanted an earlier delivery, it should be the Company's decision to grant that request.[16] Thus, in all the discussions of starting times, Respondents were wedded to rid themselves of any restrictions, despite the fact that to Eastown it was hardly of practical necessity. (Unfortunately, the record is silent regarding the hours worked by the two employees.)

In the same session, Knox asked Quasarano whether he had utilized the bulk unloading with mechanical devices since the implementation, and he replied that Eastown did not have supermarkets in its jurisdiction, and its only use for bulk unloading was at Joe Louis Arena and Tiger Stadium, where the old agreement permitted the use of mechanical devices. Thus, Eastown had no need for the provision that the Companies were generally insisting on. When Knox asked Quasarano directly why he thought it so important for Eastown to eliminate the prohibition of mechanical devices, once again Thomas interrupted and answered for him, noting that the "offer is similar to the other distributors." Knox asked, "[S]o you want to keep the contracts the same?" and Thomas replied, "[R]ight, we have a history of similar contracts." [In fact, Thomas' answer was inaccurate. Eastown had the same contract only since 1987; before, its contract was different from those of the other Companies.][17]

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[16] The old agreement provided that an employer had the right to make a special request to the Union to start earlier. Requests were made under the agreement only a "couple of times," and the Union's executive board never turned down the request.

[17] Knox also discussed the application of the "deliveries to coolers" provision to Eastown, only to find out that Eastown had used it perhaps twice, and it did not seem to Knox that important to Eastown's operations.

At the negotiations on June 7, 1991, with Oak, Ron Baetens, its president, indicated that his employees were working "eight sometimes eight-and-a-half, nine hours." In light of that representation, Knox was disturbed that Oak and the Union had not reached an agreement on overtime and asked if he knew what the Union's offer on overtime was. Baetens said that he did, that it was 2 hours a week; and Knox responded that he offered 4 hours a week, with a limit of 2 hours a day. Knox asked whether Baetens had even read the proposal, but Thomas interrupted, saying that Baetens read it and he wanted no restrictions. These events, when combined with the restrictions of the pact and Respondents' resolve to sign the same contracts, are persuasive evidence that there was an impediment to the Union's right to bargain separate agreements.

Respondents contend that the Union cannot complain of Respondents' conduct when its own conduct demonstrated that it was treating Respondents as one unit. However, whatever faults some of his proposals may have had, Knox made it clear from the beginning of negotiations that he was not enamored of concurrent bargaining and he wanted an opportunity to deal with the Companies individually. At the first negotiating session, Knox questioned whether "coordinated bargaining" would work, and that it looked to him like joint bargaining, but said that he would give it a try. On May 21, Knox expressed a desire to meet the special needs of smaller companies and suggested, but did not push for, separate bargaining with the Companies, rather than coordinated bargaining. On May 22, Knox and his assistant asked how "joint and concurrent" differed from "joint" bargaining. Long responded that "joint and concurrent" was not "joint" because some of the Companies had separate issues and there would be minor differences. Knox again pointed out the differences between Respondents. On June 11, Knox again said each Company had different issues which required different treatment. On June 27, the Union requested true separate bargaining, Knox complaining that

"concurrent" bargaining seemed too much like "joint" bargaining. Thomas replied that he would go along with the Union's request because he was legally required to do so. Thomas regarded Knox's request as lawful but "unreasonable."

On July 2, Thomas wrote Knox expressing his shock at Knox's assessment that coordinated bargaining was not working. Thomas stated: "[T]he contract for all the distributors we represent is essentially identical. . . . [W]e believe that this ploy [requesting single unit bargaining] . . . represents nothing more than yet another dilatory tactic on your part." On October 15, Knox complained that, despite the fact that he had asked for separate bargaining, it still looked to him as if Respondents were engaged in joint bargaining. Thomas denied that it was joint bargaining. On November 8, Knox wrote to West Coast, repeating his complaint:

> [I]t is your clients who said that they were withdrawing from joint bargaining and wanted separate bargaining. As I have previously said, at this stage I think true separate bargaining would be helpful, and that is why the Union has been insisting on separate negotiations. I believe you and your clients *in fact* are engaged in your version of joint negotiations and making it extremely difficult to harvest the progress that would be available if the employers truly bargained separately.

Long replied the next day, labeling this paragraph "as phoney [sic] as you are." His answer, he wrote, was the same as he gave Knox on March 27, 1990, and he quoted and emphasized it:

> Although it is the intent of each Company to execute a contract solely for each company and its employees. the bargaining positions of each are the same *and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing*

department personnel representing the bulk of each bargaining unit.

[This language was repeated numerous times by Respondents. For example, Thomas wrote Knox on December 20, 1990: "Keep in mind it is our intent to have the same agreement for all (Respondents) we represent."] On December 6, McKnight asked whether all the Respondents' final proposals were identical, and Thomas replied that there were some differences in classifications, but other than that they were identical. McKnight then asked why they decided to have separate bargaining if the employers had virtually identical problem. Long replied that he felt it was the most efficient way to bargain. On January 8, 1991, Knox complained, "We should have true separate negotiations." All of Knox's comments demonstrate that he never consented or acceded to joint bargaining. Instead, he insisted on separate bargaining.

Respondents' group bargaining, conducted without the Union's consent and contrary to Respondents' responsibility to bargain individually with the Union for their separate units, was illegal from its inception. The Union never received what it was entitled to under the Act. Respondents were bargaining as a group, in effect asking the Union to accept the six employers as a multiemployer group, a nonmandatory subject of bargaining. "The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit is for bargaining." *Dowds v. Longshoremen's Assn.*, 241 F.2d 278, 282-283 (2d Cir. 1957). More than that: the Union was deprived the right to bargain with each Company separately and denied responses, based on that Company's independent judgment about what was best for it, and not best for the group. Respondents' joint bargaining makes it impossible to predict what might have happened during collective bargaining. It destroyed the bargaining process, I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by

bargaining in bad faith, clearly within the 6 months prior to the filing of the charges, and also since the opening of negotiations in March 1990, under the cloud of the fraudulently concealed pact.

An impasse may be arrived at only when the parties have reached their disagreement after bargaining in good faith. *Taft Broadcasting,* id. at 478, *NLRB v. Pacific* Grinding *Wheel Co.,* 220 NLRB 1389 (1975), enfd. 572 F.2d 1343, 1349 (9th Cir. 1978); *United Contractors,* 244 NLRB 72, 73 (1979). enfd. mem. 631 F.2d 735 (7th Cir. 1980). I conclude, therefore, that Respondents were not entitled to implement any provision of their last, best, and final offers unilaterally. Thus, all unilateral implementations were illegal, and I will recommend that all be set aside and that all employees be made whole for any losses they suffered. That being the appropriate remedy in the circumstances, I find it unnecessary to decide whether Respondents also engaged in surface bargaining, as the complaint also alleges. I also find it unnecessary to rule on Respondents' many defenses, most of which are aimed at alleged misconduct of the Union. Nothing the Union did or failed to do makes any difference, because the six Companies' unlawful joint bargaining from the beginning made meaningful bargaining about terms and conditions of employment by individual Companies a legal and practical impossibility.

What remains to be discussed are various specific changes made by Respondents, or some of them, that the complaint alleges also violated other doctrines of Board law. Although many of these changes will be rescinded pursuant to the status quo order that corrects the illegal implementations, they may require additional relief. The complaint alleges that two of the changes made by all or some of Respondents were not even reasonably

contemplated by the last, best, and final offers: one, the elimination of the wage rate for pre-sell drivers[18] and, two, the implementation of the bulk route system. The DDOM agreement provided that pre-sell drivers were paid an hourly base wage rate of $8.33 plus a 30-cent-per-case commission from May 1, 1989, until contract expiration. Respondents continued paying wages and commissions until April 15, 1991, the date of their economic implementation. Throughout negotiations, they proposed to eliminate wages and implement an all-commission compensation structure for pre-sell drivers, a proposal that was contained in their final offers, as follows: from May 1, 1990, to April 30, 1991, a 27-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 28 cents per case), plus three cents per case for empties; from May 1, 1991, to April 30, 1992, a 27.5-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 28 cents per case), plus three-and-a-half-cents per case for empties; and after May 1, 1992, a 28-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 29 cents per case) plus four cents per case for empties. When Respondents implemented its economic proposals on April 15, 1991, they stopped paying wages but, instead of paying the 27-cent-per-case commission, which is what they offered, they continued the DDOM rate of 30 cents.

Respondents contend that their only obligation with respect to their wage implementation was to implement an all-commission wage structure, which they did by eliminating the base wage rate contained in the expired DDOM agreements and continuing the commission rate of 30 cents per case. In this respect, Respondents contend that

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[18] Pre-sell drivers deliver beer that has been sold in advance. Driver salesmen sell the beer at the time that they go to the retailer's establishment.

the bargaining history shows that the implementations were "reasonably encompassed by the final offers" and, to the extent that they were not, the discrepancy was contemplated by the bargaining history and specifically set forth in Thomas' April 10 letter. I find no merit in these contentions. Under the DDOM agreement, the wages and commissions comprised the earnings of pre-sell drivers. Respondents repeatedly stressed in negotiations that they were concerned about the overall compensation of their employees, not just wages versus commissions. Thus, Long's survey of the costs of similar services in other cities compares total compensation and its initial cover letter explaining its proposals states: "On driver compensation, for existing employees, we would like to believe we could create a cents per case commission that would achieve current levels of earnings through productivity improvement through elimination of restrictive work practices (some have referred to these practices as featherbedding)."

Respondents' proposal to alter those earnings by eliminating wages and paying 27-cent-per-case commissions was made in furtherance of their desire to achieve current levels of earnings. And, more important, that proposal was all the Union had to bargain about. The offer was not to eliminate wages and to pay 30 cents per case, an offer that Respondents never made to the Union; and the Union never had to the opportunity to consider the effect of that proposal and whether it might be willing to accept the same. The 3-cent difference was no small matter for an employee who delivered an average of 500 cases a day, that represented a $75-per-week increase.

Proposals concerning the earnings of employees are not severable. Respondents had no right to implement one proposal the elimination of wages while retaining a higher commission rate that was not part of its offer to the Union. The grant of this commission rate, greater than any offered in negotiations, demonstrated that Respondents were not acting

in good faith and was manifestly inconsistent with the principals of collective bargaining. *NLRB* v. Katz, 369 U.S. 736, 745 (1962); *NLRB* v. Crompton Mills, 337 U.S. 217, 224 (1949); *Western Publishing Co.*, 269 NLRB 355 (1984). Respondents' reliance on *Presto Casting Co.*, 262 NLRB 346 (1982), enfd. in part 708 F.2d 495 (9th Cir. 1993), cert. denied 464 U.S. 994 (1983), is misplaced. There, the Board permitted the employer to implement only the wage proposal of its final offer, which was considered clearly severable from and not inextricably intertwined with its benefits package. Finally, Thomas' letter to Knox on April 10 merely states that Respondents would continue to pay the present commission, but not base pay. That advice does not replace the offer that was on the table and is no substitute for bargaining. Thus, I conclude that Respondents violated Section 8(a)(5) and (1) of the Act.

The implementation of the bulk route system by Warren and Don Lee Dearborn, the only Companies involved in this allegation, presents a different problem, because the parties disagree about the meaning of bulk routes. The parties do not dispute that bulk routes involve deliveries of large quantities to certain customers, typically large supermarkets and large arenas, such as Cobo Hall, Joe Louis Arena, and Tiger Stadium. Prior to the implementation, the driver was paid hourly wages and a 50-percent commission of the applicable route commission. Respondents' final offers created a bulk driver classification with a $12-per-hour wage rate.

Beginning in early August 1992, Don Lee Warren and Don Lee Dearborn assigned bulk deliveries to presell drivers, whom they paid the hourly $12 rate, mostly to major chain stores such as Pace Warehouse and Warehouse Club. which before had been serviced by regular route drivers, who were being paid at commission rates. However, on some days, the Companies paid for deliveries to the same stores as if the drivers were on their regular route; and so they paid only

commission. The driver unloaded these bulk deliveries by hand, without the assistance of any mechanical devices or electrical equipment. Knox testified that inherent in the delivery by bulk is the use of a large semitruck equipped with a loading gate or electric power pallet jack to assist in the unloading of large deliveries.

The Companies contend, among other things, that the use of mechanical devices was not discussed and was not implicit in the definition of bulk deliveries. I agree. Don Lee Dearborn did not use mechanical devices for deliveries to special events under the DDOM agreement.[19] And there were no discussions at the bargaining table that indicated that Respondents' proposal to permit bulk routes incorporated the requirement that they use mechanical devices. The essence of the complaint is that the Companies' implementations were not encompassed by the last, best, and final offers. There is nothing here to show that the Companies actions went beyond what they were proposing. I conclude that this allegation should be dismissed. Nonetheless, as stated above, because there was no valid impasse, the recommended order will still require a restoration of the status quo.

The complaint alleges that, since February 7, 1991, Don Lee Dearborn unilaterally assigned casual employees to perform warehouse work at a time when warehouse employees were on layoff status. Similarly. since August 28, 1991, it unilaterally assigned casual employees to perform driving work at a time when regular driven were on layoff

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[19] I do not believe Knox's testimony that Don Lee Dearborn and Don Lee Warren made bulk deliveries with mechanical devices. He made too many misstatements during the course of his testimony, forgot facts that he surely must have remembered, and was guilty of many inconsistencies.

status and did so at times other than those stated in its last, best, and final offer, which provided:

> Casual employees shall not be used in any classification where employees are on layoff (i.e., an employee on layoff who has not yet been sent a notice of recall); nor shall casual employees comprise more than fifty (50) percent of the total work force. However, casual employees may be hired though other employees from a predecessor employer are still on a waiting list to be hired into full time positions by the successor employer. Such waiting list employees shall not impact in any way the hiring of casual labor.

Don Lee Dearborn laid off warehouse employees James Majkowski, Alexander Mazurek, and Jon Jerome and drivers David Kettler and Thomas Shaw, effective February 11, 1991. Warehouse employee Robert Mahn was on "on-call status" and worked 2 to 3 days per week from February 1991 to May 1991, when he worked full time. Mazurek and Jerome returned to work in the week ending April 7, 1991, and Majkowski, in the week ending April 21, 1991. Kettler quit on May 31, 1991. However. casual employees Robert Croskey, Jorge Garza (except perhaps the week ending April 29), Greg Pfeifer, and Sherry Jacques worked full time during the same time that the full-time employees were on layoff status.

Before the reclamation employees became classified as casual employees in February 1991, their job duties were limited to crushing cans and bottles, sorting bottles, stacking empty shelves, and driving hi-los in the reclamation area of the warehouse to move empty bottles and cans. During the same period, warehouse employees were exclusively responsible for stacking pallets onto delivery trucks, adjusting truckloads by moving pallets from one truck bay to another, stacking empty barrels. stripping delivery trucks, and parking and moving and putting gas into them. The reclamation employees did not perform any warehouse

duties prior to February 1991. However, after the February 1991 implementation of the casual employee classification clause contained in Respondents' final offers and the transfer of reclamation employees to casual employees, the casual employees began performing warehouse duties and driving hi-los in the drive-through area of the warehouse to perform these warehouse duties.

Jerome, Mazurek, and Majkowski were recalled from layoff in April 1991 and were again laid off on October 28, November 18, and December 20, 1991, respectively. Mahn was also laid off effective December 31, 1991, and returned to work in May 1992. Jerome and Majkowski were never recalled and were discharged from employment effective on April 28 and June 20, 1992, respectively, as their seniority was terminated in accordance with Don Lee Dearborn's last, best, and final offers. Mazurek quit work effective on April 24, 1992. In the meantime, Croskey, Garza, and Jacques continued to work full-time during the time that the regular warehouse employees were on layoff status and they and other casual employees (Brown, Schultz, and Murphy) performed warehouse duties.

Don Lee Dearborn contends that it did not hire casuals for the periods involved. I believe none of their testimony. The Company's records shows that the individuals were called casuals, and they were paid the rates that Respondents proposed for the casuals, between $7 and $10 per hour. If the records state that they were casuals and they were paid casual rates, I cannot credit anyone who relates that they were not casuals. Accordingly, I conclude that, having proposed that casual employees not perform warehouse and driving work when warehouse employees and driver were on layoff status. Don Lee Dearborn implemented an offer that was not contemplated by its final offer, in violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra; *NLRB* V. *Crompton Mills*, supra; *Western Publishing Co.*, supra. In addition, Don Lee Dearborn made no attempt to

notify or consult with the Union concerning its assignment of casual employees to perform warehouse work. I conclude that the Company unilaterally changed this term of employment. in violation of Section 8(a)(5) and (1). *NLRB v. Katz,* 369 U.S. at 743.

This allegation brings us back to the original complaint, that Respondents bargained in bad faith by proposing the casual and probationary clauses which left Respondents in complete control of the terms and conditions of employment of the employees so designated. Thus, the complaint has always alleged that Respondents violated Section 8(a)(5) and (1) of the Act by implementing these provisions. The proposal for casuals permitted the Companies to hire casuals to fill in for employees on vacation; off work because of illness, disability, injury, or a leave of absence; or to meet seasonal or holiday peak work loads "and the like." They were to be paid no less than $7 nor more than $10. They were to receive no benefits and had no right to arbitrate their grievances; but they had to pay union dues. The probationary clause extended the probationary period from 30 days in the DDOM agreement to 90 days, permitted termination without cause, and provided employees with no benefits during that time.

The General Counsel relies solely on *Colorado-Ute Electric Assn.,* 295 NLRB 607 (1989). enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). The collective-bargaining agreement there provided that employees received specified wages for each job classification in seven progression steps, and advancement from step to step was based on tenure. During midterm wage negotiations, the union wanted an across-the-board wage increase, while the employer countered with merit increases which would be granted at times and amounts determined by the employer and would not be subject to arbitration. The Board held that the parties could reach a lawful impasse on the employer's proposal, but the employer

was not entitled to implement the proposal because it involved "virtually unlimited discretion in determining the timing and amounts of merit increases. These are matters over which the Union has a statutory right to be consulted." Id. at 609.

Respondents agree with the Tenth Circuit's refusal to enforce *Colorado-Ute,* and the District of Columbia Circuit's refusal to enforce *McClatchy Newspapers.* 299 NLRB 1045 (1990), remanded 964 F.2d 1153 (D.C. Cir. 1992), a proceeding similar to *Colorado-Ute.* However. I am bound by Board law; and the Board has twice pronounced that an employer may not implement the kind of proposal that Respondents have made, where they have the unfettered control to pay a casual within a range of $3, without discussion with the Union and without the right to grieve to arbitration. Respondents denied that they implemented the casual employee clause, but the record supports the implementation by all. except Hubert. Accordingly, in this respect, I find that Respondents, except Hubert, violated Section 8(a)(5) and (1) of the Act. However, I find that the proposal to extend the probationary period to 90 days is not covered by either of the Board's decisions, and I do not find that the period of probation is so lengthy or so uncommon in collective-bargaining agreements that the proposal violates the Act. I will dismiss this allegation.

The complaint also alleges that, since November 18, 1991, Don Lee Dearborn unilaterally changed the route assignments and route-bidding procedure of its employees. Before, bidding for routes was based on seniority, and employees would bid based on the time the route would take, the number of cases that could be delivered. and other factors such as the safety of the route. Jay Yule, Don Lee Dearborn's general manager, and Bob Scott, its dispatcher, told employee Ronald Harris, a driver and the Union chief steward, on a Friday that they were changing his route the following Monday. The Company also changed the routes

of Nick Dimitris, Ken Graham, Bob Lumsden, and Warren Griglio. Harris's route changed from a suburban route with fewer accounts. high volume. and a safe route, to what he considered to be in unsafe intercity route, with a third more accounts, but the sale of one-third fewer cases. Because they were then paid on a commission, his pay suffered. Since the time his route was changed, there has been no more route bidding based on seniority at Don Lee Dearborn for pre-sell route drivers. Since then, until the date he testified, the Company had changed his route as many as nine more times.

When this change was made, the Union challenged it; and Thomas replied, by letter dated November 20:

> (U)nder the terms of the Employer's last, best. and final offer given to [the Union] on September 13, 1990 . . . the Employer is free to change routes as it deems appropriate. Please see Article 3 Jurisdiction Section 3.1(a) and Article 7 Managements Rights Section 7.1
>
> In those instances, where it is appropriate for my client to negotiate with you changes of working conditions not contained within the four corners of last, best and final offer, we will do so.

Yule wrote a similar letter 7 days later, denying the Union's grievance about the same issue.

Prior to the February implementation. the DDOM agreement contained no management-rights clause. Because Thomas relied on that clause, it is evident that he relied on the implementation that I have found was illegal. As a result, it was inappropriate for Don Lee Dearborn to change any term and condition of employment based on a clause that must be rescinded. Respondents contend that they bargained about the change with the Union, after which the Union filed a grievance. However, their principal brief misstates the date of the Union's grievance, which was not filed until the Company had already implemented the change. Furthermore, the

Company admits that it "may not have technically met its obligations." That is too weak an admission. This was not a technical violation. The Company completely avoided doing what was required of it under the Act. It was required to bargain to impasse before making any change of terms and conditions of employment. I conclude that its unilateral change of its employees' route assignments and the route-bidding procedure violated Section 8(a)(5) and (1) of the Act.

On February 19, 1992, Don Lee Dearborn driver/helper Tom Shaw returned from a delivery and pick-up with, among other returns, a stack of empty cases, "250s," which are supposed to be filled with 24 empty 12 ounce bottles.[20] Warehouse manager Ron Moeller called him over to where three palettes of cases were positioned and berated Shaw for his truck being a mess and for his bringing back cases which were not full. Moeller asked Shaw whether he could not tell the difference between a case that was filled with 24 bottles or 12 bottles or only two bottles and then he threw a case at Shaw, hitting him. (Shaw testified that it hit him in the chest and legs, that he fell to the ground, and that he was "stunned" and "bewildered." He clearly remembered that some bottles fell out. Harris testified merely that he saw the case hit Shaw in the chest, but Harris said nothing about Shaw falling over, only that "he took a step back." Harris also could not recall how many bottles fell out of the case. When asked whether two fell out, he said that he did not know, he did not count them, and he did not lift up the box.) This event prompted the Union to publish and distribute yet another leaflet, making fun of "Ron the Mauler," a play on Moeller's name.

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[20] They are called "250s" because the distributor receives 10 cents for each of the 24 bottles, totaling $2.40, plus 10 cents for the cardboard box.

The one in charge of distributing leaflets at Don Lee Dearborn was typically Harris, who earlier had been assaulted on his route, resulting in his fear of resuming deliveries. He was receiving workmen's compensation benefits and was at the same time employed by the Company on its "bridge program," which was intended to retain as useful workers its injured or disabled employees until they became well enough to return to their normal employment. Harris saw the Moeller-Shaw altercation and, as a result of being the employee who distributed this new particularly offensive piece of literature (at least, offensive to Moeller), the complaint alleges, the Company reduced his hours for approximately 3 weeks. Harris testified that he distributed the leaflet on March 6. That afternoon, Moeller told him that he was going to switch his hours. He no longer worked, as he had before, 40 hours each week. Instead of reporting at 8 a.m., he had to report at 9 a.m., instead of leaving at 4 p.m., he had to leave at 2:30 p.m. Thus, according to the General Counsel, he could not distribute any union literature, which he used to do before and after work, at times before the drivers had left and after some had returned, and when the night reclamation warehouse employees were in the parking lot. The General Counsel alleges that the change of time was imposed not only to punish Harris for the distribution of the leaflet but also to ensure that he would not be able to distribute other union literature to the other drivers.

One of the "Ron the Mauler" leaflets was posted in the routing--lunchroom on a bulletin board, where Union leaflets were regularly posted, and additional copies were left on the lunch table. Moeller removed the leaflet from the bulletin board and threw the copies of the leaflet that were on the lunch table into the trash. The complaint alleges that Moeller's removal violated the Act because it discouraged employees from engaging in the concerted and protected activities of communicating with other employees. The Company does not have the option of permitting flyers which it approves of to remain on the bulletin board (as it did

with notices of parties and union meetings. United Way appeals, business cards, vacation schedules, boat sales, fishing tournaments, and outings), but removing writings that offend it. Its defense is based on the fact that its action was unintentional: that is, that the leaflet was removed by Moeller and shown and ultimately given by him to Yule, who said that he would take care of it. Moeller assumed that Yule would replace it on the bulletin board, while Yule testified that he did not know that it had been removed from the bulletin board and so did not think to replace it.

I do not believe Moeller, who was upset by the attack on him. He removed the leaflet because he did not think that the employees had the right to publish such untruthful and vicious attacks. He made no mistake. Moeller was irate and his actions were deliberate. (As driver Robert Kullgren described it, Moeller seemed to be upset: he "[w]alked in the room, said good morning, gentlemen, snatched the papers, started to walk out, stopped, turned around, walked back to the board and ripped it off and left.") He not only removed the leaflet from the bulletin board to bring to Yule but also removed and threw away all the leaflets from the table, where Harris had left numerous copies. If his intention was only to show the leaflet to Yule, he had no need to remove the one from the bulletin board and destroy all the rest. To Moeller's claim that he was merely trying to keep the room neat and tidy so that the drivers could do their paper work, the drivers uniformly and credibly testified that they had not seen Moeller in that room before. Furthermore, even if Yule did not know where the leaflet came from, the Company is responsible for Moeller's removal of the leaflet, because the employees must have reasonably assumed that leaflets that attacked management would not be tolerated by their employer. The removal tends to discourage employees from engaging in activities protected by Section 7 of the Act and

violates Section 8(a)(l).[21] *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Saint Vincent's Hospital*, 265 NLRB 38 (1982), enfd. in relevant part 729 F.2d 730 (8th Cir. 1984). Because Don Lee Dearborn has committed numerous other violations, I do not deem this violation isolated, as the Company contends.

It does not follow from my finding of a violation that the Company punished Harris for posting the flyer. Harris testified that his distribution of the leaflets and the posting on the bulletin board on March 6 was immediately followed by Moeller's change of his hours and that that was done to ensure that Harris started work after the drivers left and finished before the drivers returned. Yet two drivers, Kullgren and Mike McGowan, who saw Moeller remove the flyer, insisted that he did so on Wednesday, March 11, and that was the first day that the leaflet had been distributed. That is 5 days after Harris said that the event took place. I credit their testimony (they had no reason to lie) and, in so doing, find that the distribution of the flyer could not have been the reason that Moeller reduced Harris's hours. Rather, I find, as Moeller testified, that there was insufficient work for Harris to do. Harris had been doing "make work," work that the other employees on the bridge program were physically unable to do. For example, Harris scrubbed floors, painted, and cleaned the bathrooms and drains. Another employee, being unable to bend over or reach above his shoulder, painted only from shoulder height to his knee. Others counted cans, patrolled the parking lot, and picked up checks. No other employee was able to do what Harris was assigned to, and there is no evidence that the work that he

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[21] In addition, the flyer is not so offensive that it should have been removed. Rather, it is a humorous and almost playful leaflet, making clean fun of Moeller's temper tantrum.

had done before the reduction of his hours was performed by another.

In addition, Harris had been distributing massive amounts of literature for more than a year and had been the union steward since 1989. He filed 150 grievances, an average of 4 to 8 each month, and wore T-shirts showing his allegiance to the Union. Indeed, in 1991 and 1992, Harris leafleted and picketed outside the residences of both Don Klopcic Sr., Don Lee Dearborn's chief operating officer, and Klopcic Jr., Moeller, and Yule. Yet, the Company never disciplined him or discriminated against him or changed any term or condition of his employment. In addition, there appears to have been no reason that Harris could not have reported to his job earlier than 9 a.m. in order to leaflet the other employees, although Harris testified to his belief that the Company's rules prohibited him from staying at his job after his workday. That does not appear to have limited his leafleting activities prior to March 6. I find that there was no credible antiunion reason that Don Lee Dearborn would have wanted to punish Harris on March 6, which was just the same as any other work day. I find that the General Counsel never proved a prima facie case that Don Lee Dearborn took action against Harris for any activity protected by the Act and that, in any event, the Company proved beyond doubt that it reduced his hours for legitimate reasons and not for reasons which violated the Act. *Wright Line,* 251 NLRB 1093 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Corp.,* 462 U.S. 393(1983).

Another allegation of the complaint related to warnings that Powers gave to its drivers. For years, Powers had certain policies concerning drivers' duties to pick up empty beer cans. They were either returned in boxes of 24 or in a plastic bag which was supposed to hold 192 12-ounce cans, for which Powers would credit the customer $19.20 against its bill. The bag was either clear or translucent, and most

were marked with a line near the top. That should have indicated when approximately 192 cans were placed in the bag, but that number still might not be in the bag, due to the inclusion of larger cans or bottles or even foreign objects to make the contents appear greater than they were. Powers directed that the drivers not count the cans at the customers' premises because counting wasted too much time and caused them to miss making deliveries to other customers.

Prior to July 1992, Powers' policy was unclear. In some instances, supervisors directed the drivers, when given bags that were short, to advise their supervisors of what was happening and have the cans counted at Powers' premises. In other instances, a driver advised his customer to fill the bag better and reported the conversation to his supervisor. Often, the driver's supervisor told the driver that he would talk directly with the customer because the customer was a large customer and the supervisor did not want to get it upset. The supervisor would then threaten the customer that the bags would no longer be picked up, but then the supervisor would tell the driver to pick up the bags anyway. At best, the advice to the drivers was conflicting, but there is no dispute that Powers never disciplined any drivers, even though they continued to bring back inadequately filled bags, or enforced any related rule in its drivers' handbook.

In 1992, Powers began to realize that its customers were taking enormous advantage of it. It was crediting them with vast amounts of money for the return of cans that were not being returned. It decided to enforce its rule. At a drivers' meeting in June 1992, Delivery Manager Don Bishop advised the drivers that starting immediately they were required to tag bags, that is, they were to attach a paper tag to each bag that they picked up with the customer number on it and their driver number. Before then, they did not have to use identification tags. On July 1, Bishop told the drivers that they would now be required to make sure the, bags were filled with the proper amount. The drivers were allowed a

shortage of no more than 5 percent, and they would face discipline if they violated that rule. Beginning in July, Powers began to randomly and selectively audit the number of cans being returned. It finally purchased a can counter and began to count all the bags brought back. If the total of the cans was more or less than 5 percent of the total number that it had credited its customer, it disciplined the driver. From August to November 1992, Powers issued warnings for violation of the empty pick up rule to Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks. The complaint alleges that these warnings violated the Act because discipline had never been imposed before, and Powers had a responsibility to discuss with the Union its desire to mete out discipline before it could begin to do so.

Powers claims that the Union waived or otherwise relinquished its right to bargain over the discipline that it imposed on its drivers because the Union "was aware of Powers' Standard Operating Procedure for 'Empty Pick-Ups' as early as July, 1990" and that "on November 18, 1991 the Union was given *actual* written notice of Powers' intention to enforce the procedure through corrective disciplinary action." The Company further contends that "in April 1992 the Union received notice of Powers' implementation [and in] June, 1992 when the parties met to discuss work rules, the Union failed to object or voice any concern over the policy." The arguments fail, because there is no record support that Powers ever advised the Union that it intended to enforce anything with disciplinary action. There was no new policy. The only written notice that Powers sent the Union on November 18, 1991, were rules, most of which Powers represented were already in effect and were merely rewritten for clarity. The six paragraphs under the heading "EMPTY PICK-UP" are identical to those previously in effect; and a new paragraph, headed "EMPTY LOADING," was added, but that was not the writing under which Powers

meted out its discipline. Otherwise, Powers offered nothing to support its claim that the Union had notice that Powers disciplined employees in the past or was going to discipline employees in the future. The record is similarly barren of proof that Powers consulted with the Union about its plan to begin a new policy and enforce its empty can policy with discipline. I conclude that Powers violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz,* 369 U.S. at 747; *Great Western Produce.* 299 NLRB 1004 (1990); *Hyatt Regency Memphis,* 296 NLRB 259, 263-264 (1989), enfd. in relevant part 939 F.2d 361, 372-373 (6th Cir. 1991).[22]

Finally, on December 6, at the negotiating table, in support of his argument that Respondents were entitled to some movement at the bargaining table from the Union, Long stated that personalities should not be a part of the negotiations. He then proceeded to make them exactly that. He complained that the Union's proposals of packages were not making any progress, nor was its proposal to limit the negotiations to only those matters that the parties had labeled as key issues and that the Union's conduct was no better than its corporate campaign. He began to talk about how upset the Companies were with a number of the Union's demonstrations, and he cited the Union's protest, in the form of a mock wedding, outside the church at which Bob Baetens' son was getting married. Knox said: "Well, I thought that, you know, that they told us nobody was upset." Long replied: "You're damn right they were upset. There were a lot of people that were upset. Not just on that, on a lot of things." He added, according to the General Counsel's witnesses: "In fact, two of the distributors . . . told me they'd had have you killed if they could get away with it." Later in

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[22] Respondents' attempt to distinguish *Hyatt Regency* because it "does not involve a failure to bargain" is erroneous. The Board wrote, at p. 263: "[W]hen the Respondent unilaterally implemented this change in practice, it violated Section 8(a)(5) and (1) of the Act."

the meeting, Long called Knox an epithet, and a physical altercation between the two was narrowly avoided.

Long denied that he made the threat. Rather, he testified that he said "I would not be surprised if some of the owners wouldn't like to kill you [Knox] if they thought that they could get away with it." He also said that he said it without raising his voice and in a conversational manner, all of which I find incredible. This was a hard and difficult meeting. There was nothing low-key about it. All witnesses agree that Long was angry that day, and there was testimony of several expletives. Furthermore, Long impressed me as the very type who would lose his temper, as he did during the hearing, or say things that he later regretted, as was evident even in some of the comments he made during the hearing as attorney for Herbert. (One time he even loudly cursed, and I had to reprimand him for doing so.) All told, the threat is consistent with his temperament, and I find that he said it. Respondents further contends that it was not taken seriously by Knox. Although I was greatly troubled by Knox's ability to recall accurately various events to which he testified, and it may be that he amplified on his fears resulting from Long's statement, nonetheless one does not make statements about killing someone else. The mere mention of "killing," in the presence of the employee-negotiators, imparts the fear of physical harm to those who engage in the protected activity of representing employees as their collective-bargaining agent. Long is an attorney and presumably knows his clients. Indeed, even if I found that Long only speculated about the actions of his clients, I would still find a violation. He is in a position to express their thoughts and feelings, as he does during negotiations. This wholly inappropriate statement raises a specter of fear of physical harm to a representative of the employees. That is prohibited conduct under Section 8(a)(1) of the Act.

The unfair labor practices found herein, occurring in connection with the Respondents' businesses, have a close,

intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in various unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order that all Respondents, except West Coast, rescind the February 7 and April 15, 1991 implementations of the last, best, and final offers and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new casual employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. I shall also order Respondents to make all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes. Backpay shall be computed in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). If Respondents did not contribute to employee benefit funds, interest shall be paid as prescribed in *Merryweather Optical* Co., 240 NLRB 1213, 1216 fn. 7 (1979). Respondents shall also make whole employees for the implementation of a wage rate inconsistent with their last offers to the extent that the employees were harmed thereby, with interest. If employees lost coverage for various benefits, I shall order Respondents to reimburse them for any expenses incurred as a result of Respondents' failure to permit them coverage, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cit. 1981). Don Lee Dearborn and Don Lee Warren shall also make whole all employees

who had to perform bulk routes and were paid different rates, to the extent that the employees were harmed. Respondent Don Lee Dearborn shall also make whole those drivers and warehouse employees who were on layoff status at the time when it unilaterally assigned casual employees to perform warehouse and driving work and at times other than those provided in its last, best, and final offer and it shall also make whole those of its regular employees whom it terminated when their layoff status was extended for more than six months by reason of the employment of casual employees. Had it not been for the violation of the Act, they might not have been discharged. Accordingly, they are entitled to immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to be made whole for any loss of wages and other benefits they may have suffered by reason of Don Lee Dearborn's discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest. Don Lee Dearborn shall similarly make whole those employees who were detrimentally affected by its unilateral change of their route assignments and route bidding procedure in the manner prescribed in *F. W. Woolworth Co.*, rescind its new policy, and restore the old policy. Finally, Powers, without consultation with the Union, issued warnings to its employees for failing to abide by its rules that it had not enforced. I shall order Powers to remove that discipline from the employees' personnel files of Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks and notify them of its action.

[Recommended Order omitted from publication.]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON LEE DISTRIBUTOR, INC. (WARREN), ET AL.,	)
Petitioners/Cross-Respondents,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent/Cross-Petitioner,	)
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL, 1038,	)
Intervenor.	)

BEFORE: BOGGS, NORRIS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated to the

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

July 10, 1998

/s

Leonard Green, Clerk

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b) (1988):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

NOTICE TO EMPLOYEES AND MEMBERS

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain in good faith with Hubert Distributors, Inc., with respect to drug testing and other mandatory subjects of bargaining, by failing to respond, for excessively long periods of time, to bargaining requests, and by failing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment for the employees we represent in the bargaining unit described below.

WE WILL NOT, in any like or related manner, fail and refuse to bargain with Hubert regarding the bargaining unit described below.

WE WILL meet at reasonable times and confer in good faith with Hubert with respect to wages, hours, and other terms and conditions of employment for the employees employed in the following bargaining unit, and we will, upon request, execute a written contract incorporating any agreement reached:

> All full-time and regular part-time driver-salesman (sic), helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert at its Pontiac, Michigan, facility; but excluding all other employees, professional employes (sic), office clerical employees, guards and supervisors as defined in the Act.

LOCAL 1038, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

(Charged Party)

Dated: 1/14/93 BY: /s/ Robert E. Knox

(Representative) President (Title)

LOCAL UNION No. 1038

affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

June 15, 1990

Fred Long
West Coast Industrial
Relations Association
170 Knowles Drive
Los Gatos, California 95030

Dear Mr. Long:

In order to better prepare for the more substantive bargaining session forthcoming on June 21, 1990, please see the request, listed below, for information which we submit and ask that the Companies promptly provide in writing the specifics outlined in the request herein.

1. Complete OSHA 200 logs covering the workplaces for 1987, 1988 and 1989.
2. All reports, memos, studies or other documents concering (sic) noise, dust, and pesticide levels in the workplaces for 1987, 1988 and 1989. This is to include results of tests performed, and information resulting from work performed by internal and/or external consultants employed by the Company.
3. All current Material Safety Data Sheets covering chemicals, solvents, pesticides, etc. used in the workplaces.
4. All other reports or studies the Company or its agents may have produced concerning safety conditions in the workplaces during 1987, 1988 and 1989.

5. A summary of the number and types of injuries and illnesses occuring (sic) within the plant which were covered by Workers Compensation during 1987, 1988 and 1989.
6. Copies of the Company's safety policies and rules in force, and training materials currently used.
7. Copies of Safety Committee meeting minutes for 1987, 1988 and 1989.

If the information is not applicable, available, or otherwise not available at this time, please provide us a detailed written response and explanation immediately with details.

Sincerely,

Robert E. Knox
President

REK/sb

LOCAL UNION No. 1038

affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

June 18, 1990

Fred Long
West Coast Industrial
Relations Association
170 Knowles Drive
Los Gatos, California 95030

Dear Mr. Long:

In order to better prepare for the more substantive bargaining session forthcoming on June 25, 1990, please see the attached request for information which we submit and ask that the Companies promptly provide in writing the specifics outlined in the request herein.

1. Please provide any available information or copies of records maintained independently or derived from the Company's health insurance programs which describe the nature of employee health insurance claims. This includes any analysis performed by either your company or your insurance carrier of this claim's experience, including any financial analysis. In particular, provide any analysis of health insurance claims which describe either the costs or the incidence of any specific health disorders (such as back injuries or other muscular-skeletal disorders, etc.)

2. Provide a description of all disability claims by bargaining unit members during the past 3 years, including:

   (a) Name, age, date of hire and date of disability.

   (b) Job title at time of disability (and during previous year, if available).

(c) Employee's average earnings at time of disability.

(d) Length of disability.

(e) If disability involved surgery, provide:

1. total cost of surgical procedure.

2. amount of applicable surgical benefits paid to employee.

(f) Without revealing individual employees' names, provide the nature of the injuries or health problems which occasioned these claims, including the ICD-9 code numbers if available.

If the company or your insurance carrier conducts any other analysis of health insurance claims experience such as lengths of hospital-stays or disability for specific health disorders, please provide a copy of such analyses, including a list of all specific health disorders or diagnosis codes.

3. Please provide information regarding the Workers' Compensation Insurance programs, including the financial experience for 1987, 1988, and 1989 and any analysis by the insurance carriers of this experience, especially in regard to particularly costly injuries and illnesses. Also, please provide a description of all occupational illness claims during 1987, 1988, and 1989 for current or former employees.

Also please include the following items regarding claims for occupational injuries:

(a) Name, age, date of hire and date of disability.

(b) Job title at time of disability (and during previous year, if available).

(c) Employee's average earnings at time of disability.

(d) Length of disability.

(e) Nature of disability.

(f) Disposition of claim (paid, denied and pending, or denied and closed).

(g) Amount of payments made, including medical payments; specify costs of surgery separately.

(h) Cost to company for legal representation during processing of claims denial.

4. Please provide a description of the company's ergonomic hazards, including any efforts to redesign those operations in order to reduce these hazards. In addition, we would like to receive a copy of the Company's medical policy on Carpal Tunnel Syndrome.

Please indentify (sic):

(a) Any consultants contacted or used.

(b) Any documentation of the impact of ergonomic job-design changes on either the productivity or the earnings of the operators in question.

5. Please provide a copy of the Company's Written Hazard Communication Program, including the list of hazardous substances. In addition, please provide copies of material safety data sheets (MSDS) for each hazardous chemical used by the Company. Also copy of education and training program for workers exposed to hazardous substances.

Testimony of Thomas Vella

Q. Okay. And Mr. Long responded that the parties have agreed on the issues, but there may be exceptions, is that correct?

A. Uh, correct. And that whether we had a mutual aid pack was none of his business.

Q. All right. Mr. Long also told Mr. Knows that the distributors could also retain someone else without penalty?

A. I don't recall that.

Q. I've handed you your handwritten bargaining notes for March 27th, 1990.

Would you read through the first page and tell me whether Mr. Long made that statement?

A. Yeah, the --

Do you want me to read the notes, or just recall from the --

Q. No. Put the notes down.

A. Okay.

Q. And my question is, Mr. Long told Mr. Knox that the distributors could retain someone else without penalty, is that correct?

A. I don't recall that being said.

Q. And has reading your notes refreshed your recollections?

A. No, it hasn't.

Q. Would you agree with me that that statement is contained in your notes?

A. Yes, I will.

Q. You wouldn't have written down something that wasn't said would you, Mr. Vella?

MR. LONG: Objection.

JUDGE SCHLESINGER: What basis?

MR. LONG: I'm sorry. Objection to the form of the question.

JUDGE SCHLESINGER: No. He can answer as to what his normal practice is.

THE WITNESS: My normal practice is to write down what was said.

Whether I would write on these notes something that wasn't said, say a though that I was having at the time, it's possible.

But I'm not implying that that's what that is.

BY MS. PAPPAS:

Q. Would you agree with me, Mr. Vella, that your notes say, "Fred said that they can retain someone else without penalty."?

A. Yes.

Q. Mr. Vella, you attended the second bargaining session on April 18th, 1990?

A. I believe I did.

Testimony of Robert Knox

A. Uh, yes, it was.

Q. All right. Did you have a response to this proposal at that time?

JUDGE SCHLESINGER: Which – what are you referring to now?

MS. PAPPAS: I'm sorry. The handwritten one.

A. (continuing) I told them we agreed with, you know, those adjustments because it addressed our needs.

Q. Mr. Knox, do you recall whether or not there were any requests made by the Union concerning documents at this bargaining session?

A. Yes.

Q. Will you tell us what was said and by whom?

A. Steve Wolak, the attorney we had at the table with us, asked if the Employers – said that he wanted any doc – agreement that the Employers had between themselves, uh, binding themselves, or anything that would be of mutual aid

or anything like that. He said that we needed it if we were going to be able to negotiate, that we had to know if there was any restrictions or any limitations, uh, among the parties.

Q. Mr. Knox, your testimony was that the Union had made several requests for this document over the course of negotiations, that the Employers had – I believe your testimony was that the Employer had – either told you they weren't aware of such a document or they wouldn't respond to your questions or that it didn't exist.

Why after a year-and-a-half of negotiations, were you still asking about such a document?

A. Well, I still had in my mind that back in '87 that there was this power of attorney which really was much more than just a power of attorney. It actually was an agreement that tied the distributors together and showed what leverage they had on each other, how they would make their decisions, uh, what kind of pressure whey could put upon to each other, and, uh, I felt that by the actions through the course of

negotiations that, you know, that they were, in fact, tied together and not able to make individual decisions.

And then more recently when – it was just a meeting or two before that when – we had met with Eastown and we had already been under the implemented offer so we had a chance to get an appraisal as to what the Employers really needed out of any – what they claimed they didn't want any restrictions – and as I was asking Jim Quasarano, you know, uh, uh, how many, you know, what's your trucks selling now, now that you haven't got a load limit now that you have imposed that.

And realizing that almost everybody had under – in his place was selling within the area that we had out there, uh, that on the curfews – most of the people were getting in within the curfews and just a few over and when they did get over it was still within range that, you know, we could have talked about.

And we talked about the coolers where there was two out of I don't know how many hundreds of coolers that they

made adjustments on. And, uh, starting times where they were, you know, within the range of what we were offering.

And I thought to myself, you know, with the offer that we have on the table; with what they are experiencing, why don't we get an agreement with Eastown. Or at least to the point of saying, you know, with these minor adjustments, these tune-ups, we are going to have an agreement.

And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know – well, marching in lock step really because Cris Thomas kept saying they all wanted – they had the same everything else and we were getting no place with them. So I figured that they had to have some sort of document that bound them together. And we wanted to know what the conditions were so we could try to formulate our negotiations and create something.